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90-1940

No.

Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRAPPER MINING INC.,
WYODAK RESOURCES DEVELOPMENT CORP.,
Petitioners,

v.

MANUEL LUJAN, JR.,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Dated: June 17, 1991

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE GOVERNMENT BREACHED THE CONTRACTUAL LIMITATIONS REGARDING FREQUENCY AND NOTICE WHICH IT IMPOSED ON ITS RIGHT TO UNILATERALLY READJUST THE COMMERCIAL TERMS IN ITS COAL LEASE AGREEMENTS WITH THE PETITIONERS, BY EXERCISING THE RIGHT AFTER TEN YEARS INSTEAD OF TWENTY YEARS AS THE LEASES PROVIDE.

II. WHETHER SECTION 6(a) OF THE FEDERAL COAL LEASING AMENDMENTS ACT OF 1976 (FCLAA) WAS INTENDED TO DIRECTLY CONVERT THE TWENTY-YEAR READJUSTMENT INTERVAL IN THE PETITIONER'S PRE-FCLAA LEASE AGREEMENTS TO TEN YEARS BY OPERATION OF LAW, WITHOUT NEED FOR A VALID READJUSTMENT OF THE LEASES ACCORDING TO THEIR ORIGINAL TERMS.

PARTIES

Trapper Mining Inc. was an appellant in No. 89-1372 in the Tenth Circuit Court of Appeals. Related parties, as defined in Rule 29.1, are the Williams Fork Company, Colorado-Ute Electric Association, Inc., Trapper Investments, Inc., the Salt River Project Agricultural Improvement and Power District, Tri-State Generation and Transmission, Inc., Pot Luck Mining, Inc. and Platte River Power Authority. General Electric Holdings, Inc. was also an appellant in No. 89-1372 but was granted leave to withdraw as a party because it had assigned its interest in the leases at issue to Trapper Mining Inc.

Wyodak Resources Development Corp. was the appellee in No. 90-8025. Related parties, as defined in Rule 29.1, are the Black Hills Corporation and Western Production Company.

Manuel Lujan, Jr., as Secretary of the United States Department of the Interior, was an appellee in No. 89-1372 and an appellant in No. 90-8025. Other appellees in No. 89-1372 were Neil Morck, former Colorado State Director of the Bureau of Land Management (presently H. Robert Moore), and Bruce R. Harris and R. W. Mullen in their capacities as Administrative Judges of the Interior Board of Land Appeals, Department of the Interior. In No. 90-8025, William H. Lee was an appellant in his capacity as Chief, Branch of Mining Law and Solid Minerals of the Wyoming State Office, Bureau of Land Management, Department of the Interior.

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MANUEL LUJAN, JR.
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Petitioners, Trapper Mining Inc. and Wyodak Resources Development Corp., respectfully pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit in *Trapper Mining Inc. v. Manuel Lujan, Jr., et al.*, No. 89-1372, and *Wyodak Resources Development Corp. v. Manuel Lujan, Jr., et al.*, No. 90-8025.

OPINIONS BELOW

The opinion of the court of appeals is reported at 923 F.2d 774 (10th Cir. 1991) and is reprinted in Appendix A.

The United States District Court for the District of Wyoming entered two orders in *Wyodak Resources Development Corp. v. Manuel Lujan, Jr., et al.*, No. C89-0057J, one on cross motions for summary judgment and one on the defendants' motion to alter or amend the judgment. Neither order is reported. They are reprinted in Appendices B and C.

The opinion of the United States District Court for the District of Colorado in *Trapper Mining Inc., et al. v. Manuel Lujan, Jr., et al.*, No. 88-Z-1812, is not reported. The judgment of dismissal and transcript of its bench ruling are reprinted in Appendix D.

The final administrative decisions of the Department of the Interior were entered by the Interior Board of Land Appeals of the Office of Hearings and Appeals (IBLA). They are reported in *Wyodak Resources Development Corp.*, 106 IBLA 339 (1989), which is reprinted in Appendix E, and in *General Electric Holdings, Inc., et al.*, 103 IBLA 366 (1988), which is reprinted in Appendix F.

The final administrative decisions in both cases rely on the IBLA's decision in *Franklin Real Estate Co.* which is reported at 93 IBLA 272 (1986) and reprinted in Appendix H.

JURISDICTION

The judgments of the court of appeals were entered on January 15, 1991. Petitioners jointly filed a timely petition for rehearing, which was denied on March 20, 1991. The order of denial is reprinted in Appendix G. This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).

STATUTORY AND LEASE PROVISIONS

These cases involve interpretation of section 7 of the Mineral Lands Leasing Act of 1920 (MLLA), 41 Stat. 439, as it was in effect when the petitioners entered into coal lease agreements with the United States in 1958 and 1959, and as it was amended by section 6 of the Federal Coal Leasing Amendments Act of 1976 (FCLAA), 90 Stat. 1087. From 1920 until 1976, section 7 of the MLLA provided:

> For the privilege of mining or extracting the coal in the lands covered by the lease the lessee shall pay to

the United States such royalties as may be specified in the lease, which shall be fixed in advance of offering the same, and which shall not be less than 5 cents per ton of two thousand pounds, due and payable at the end of each third month succeeding that of the extraction of the coal from the mine, and an annual rental, payable at the date of such lease and annually thereafter, on the lands or coal deposits covered by such lease, at such rate as may be fixed by the Secretary of the Interior prior to offering the same, which shall not be less than 25 cents per acre for the first year thereafter, not less than 50 cents per acre for the second, third, fourth, and fifth years, respectively, and not less than $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases shall be for indeterminate periods upon condition of diligent development and continued operation of the mine or mines, except when such operation shall be interrupted by strikes, the elements, or casualties not attributable to the lessee, and upon the further condition that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods. The Secretary of the Interior may, if in his judgment the public interest will be subserved thereby, in lieu of the provision herein contained requiring continuous operation of the mine or mines, provide in the lease for the payment of an annual advance royalty upon a minimum number of tons of coal, which in no case shall aggregate less than the amount of rentals herein provided for. He may permit suspension of operation under such

> lease for not to exceed six months at any one time when market conditions are such that the lease cannot be operated except at a loss.

30 U.S.C. § 207 (1958). Section 7 was replaced by section 6 of FCLAA effective August 4, 1976. Subsection 6(a) provides:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. § 207(a) (1986).

The lease agreements were executed on the Secretary of the Interior's Form 4-696 in 1958 and 1959. The introductory paragraph states:

> This lease, entered into on [respective dates] by the United States of America, the lessor, through the Bureau of Land Management, and [respective lessees] the lessee, pursuant and subject to the terms and provisions of the act of February 25, 1920 (41 Stat. 437), as amended, hereinafter referred to as

> the act, and to all reasonable regulations of the Secretary of the Interior now in force which are made a part hereof,

Section 3(d) of the lease agreements states:

> The lessor expressly reserves:
>
> * * *
>
> (d) The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

STATEMENT OF THE CASE

Statement of Facts

Trapper's predecessor, Utah Construction Co., and Wyodak, as lessees, entered into coal lease agreements with the United States acting through the Bureau of Land Management (BLM) as the lessor, on June 1, 1958, and May 1, 1959, respectively. Wyodak's lease is designated W-073289 and Trapper's leases are designated C-07518 and C-07519. Trapper and Wyodak have been producing coal from the leases at their respective mines in Colorado and Wyoming for many years, except that Trapper will begin production from lease C-07519 in the late 1990s.

The lease agreements were made pursuant to the Mineral Lands Leasing Act of 1920, 41 Stat. 437, 30 U.S.C. § 181, *et seq.* (MLLA). Section 2 of the MLLA, 30 U.S.C. § 201

(1958), authorized the Secretary of the Interior to enter into the agreements. Section 7 of the MLLA, 30 U.S.C. § 207, authorized the Secretary to set various terms and conditions in the lease agreements, including the rentals and royalties payable to the United States at or above certain minimum rates. Section 7 also provided that the duration of coal leases would be "indeterminate . . . upon condition of diligent development and continued operation of the mine or mines, ..." Coupled with the indeterminate duration, section 7 authorized, but did not require, readjustments of the terms and conditions of coal leases at twenty year intervals "as the Secretary . . . may determine, unless otherwise provided by law" at the end of any such interval.

The Secretary prepared a standard coal lease Form 4-696 pursuant to his leasing authority under the MLLA. Trapper's lease agreements were made on the October 1956 edition of the form and Wyodak's agreement was made on the December 1958 edition. The introductory paragraph of both editions states that the leases were entered into:

> . . . pursuant and subject to the terms and provisions of the act of February 25, 1920 [MLLA] (41 Stat. 437), as amended, . . . and to all reasonable regulations of the Secretary of the Interior now in force which are made part hereof,

The Secretary's form also provided for the United States' right to readjust terms and conditions at twenty year intervals. Section 3(d) reserved:

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of twenty years from the date hereof and thereafter at the end of each succeeding twenty-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period. Unless the lessee files objections to the proposed terms . . . within 30

> days after receipt of the notice of proposed terms for a 20-year period, he will be deemed to have agreed to such terms.

Congress amended the coal provisions of the MLLA extensively in 1976 by enacting the Federal Coal Leasing Amendments Act of 1976, 90 Stat. 1083 (FCLAA). Section 6 of FCLAA replaced section 7 of the MLLA entirely. *See* 90 Stat. 1087. Section 6 of FCLAA, 30 U.S.C. § 207 (1986), continued the Secretary's authority to set the terms and conditions of coal leases, but revised the limitations on that authority which had been imposed by section 7 of the MLLA since 1920. Section 6(a) provides for coal leases that:

> (1) have a term of 20 years, but can be extended thereafter by continuing production;
>
> (2) "shall be terminated" if they are not producing coal in commercial quantities at the end of ten years;
>
> (3) bear a royalty obligation to the United States of at least 12.5% of the value of coal produced by surface mining operations.

In addition, the last sentence of section 6(a) states:

> Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

On February 7, 1979, the Wyoming State Office of the BLM notified Wyodak that its lease would be readjusted on May 1, 1979. However, the Wyoming State Office failed to transmit proposed new terms to Wyodak within two years, as required by the Secretary's regulations. Therefore, the Wyoming BLM notified Wyodak in a letter dated February 7, 1983, that the government's right to readjust had been waived. The BLM's letter also notified Wyodak that the next readjustment opportunity would occur on May 1, 1999,

twenty years after the first one.[1] But, on April 27, 1987, the Wyoming BLM changed its position, notifying Wyodak that its lease would be readjusted as of May 1, 1989. Wyodak objected that the readjustment is not due until 1999 because the twenty-year interval remains in effect until it is changed by a valid readjustment, among other grounds. The BLM overruled the objection and readjusted the lease effective May 1, 1989.

Trapper's leases first became subject to the United States' right to readjust their terms and conditions on June 1, 1978. However, the BLM's Colorado State Office failed to give notice that it intended to readjust until September 12, 1979. That notice transmitted a new form entitled Coal Lease Readjustment, section 23(a) of which proposed the following condition:

> This lease is subject to reasonable readjustment of any conditions of the lease, including royalty rates, at the end of this readjustment period on May 31, 1988, and subject to readjustment at the end of each 10-year period thereafter.

Trapper's predecessor as lessee protested the proposed readjustment on the grounds that the notice was untimely because it was given after the first twenty year interval specified in the lease agreements, among others. The Colorado BLM rejected the protest and an appeal was taken to the Interior Board of Land Appeals (IBLA). Following the decision in *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982),

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[1] Several months earlier, the Wyoming BLM initially took the position that the next readjustment was due in ten years under virtually identical circumstances. But, it agreed that twenty years was correct after the lessee questioned its initial position. *See Chevron U.S.A. Inc., et al.*, 108 IBLA 96, 97 (1989). As in Wyodak's case, the Wyoming BLM reverted to the ten-year position in Chevron's case in 1986. *Id.*

the IBLA vacated the proposed readjustment along with several others in a consolidated opinion, holding:

> . . . where there was no notice prior to the end of the 20-year period from BLM to the lessee that readjustment of the lease terms was contemplated, we now must hold that BLM had no authority to belatedly readjust the terms in these coal leases as the several BLM decisions attempted to do.

Kaiser Steel Corp., et al., 63 IBLA 363, 367 (1982).

On remand in 1982 and through 1988, the Colorado BLM took the position that the next readjustment opportunity arose on June 1, 1988, while Trapper and its predecessor lessees asserted that the next opportunity does not arise until 1998 because the twenty-year interval can only be changed to ten years by a valid readjustment.[2] The BLM eventually overruled these objections in a decision issued November 18, 1987, and readjusted Trapper's leases effective June 1, 1988.

Decisions Below

Wyodak and Trapper appealed the respective readjustments to the IBLA, which upheld them in *Wyodak Resources Development Corp.*, 106 IBLA 339 (1989), and *General Electric Holdings, Inc., et al.*, 103 IBLA 366 (1988). Appendix (App.) A-41, *et seq.*; A-52, *et seq.*. Wyodak and Trapper then filed actions for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701-706, and for declaratory and injunctive relief in the U.S. District Courts for the Districts of Wyoming and Colorado, respectively. Both cases were decided on stipulated facts and cross motions for summary

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[2] The BLM's Utah State Office and the Solicitor's Office took the twenty-year position in 1982 through 1984 in a nearly identical case involving a lease held by Kanawha & Hocking Coal and Coke Co. *See* Record, Trapper's Appendix, Tabs I, J and K. The Utah BLM changed to the ten-year position late in 1985. *Id.* at Tab J, p. 1.

judgment pursuant to the courts' jurisdiction under 28 U.S.C. § 1331.

The Colorado court affirmed the readjustment in a bench ruling and entered its Judgment of Dismissal on November 9, 1989. App. A-33, *et seq.* Relying on *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) (*Bowen*), the court stated that Congress can change terms of contracts between the government and private parties by legislation. The court then held that the ten-year readjustment interval in section 6(a) of FCLAA was self-executing and applied directly to Trapper's leases on their twentieth anniversaries.

The Wyoming court reversed the readjustment of Wyodak's lease in its Order On Cross Motions for Summary Judgment dated December 20, 1989. App. A-23, *et seq.* The Secretary filed a motion under Fed. R. Civ. P. 59(e), submitting the Colorado court's decision, but the Wyoming court affirmed its prior ruling in favor of Wyodak. App. A-15, *et seq.* It held that the twenty-year readjustment interval in section 3(d) of Wyodak's lease was a condition like all others that could be changed to ten years only by a valid readjustment. It also held that the plain language of section 6(a) of FCLAA permitted no distinction between the ten-year readjustment interval and other mandatory terms prescribed for coal leases. It concluded, therefore, that the Secretary made an irrational distinction in claiming that the untimely readjustment in 1979 waived application of the other mandatory terms in section 6(a), but that he had no discretion to waive imposition of the ten-year interval.

Trapper and the Secretary appealed the respective judgments to the court of appeals pursuant to 28 U.S.C. § 1291, and it consolidated the cases for decision. Relying primarily on *Bowen* and *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982) (*Merrion*), the court of appeals affirmed the Colorado judgment and reversed the Wyoming judgment, thereby affirming the 1988 and 1989 readjustments in both cases.

App. A-1, *et seq.* It first held that the "unless otherwise provided by law" proviso in former section 7 of the MLLA, and in section 3(d) of the leases, means Congress reserved the power: (1) to take away the Secretary's periodic right to readjust; (2) to circumscribe the Secretary's readjustment authority; and also (3) to directly readjust the leases by legislation. It then held that, although the Secretary "would have had no choice but to adopt the ten-year interval" had he timely readjusted the leases in 1978 and 1979, "the new interval automatically took effect then because the language [of the last sentence of section 6(a) of FCLAA] directly imposed it." App. A-10.

REASONS FOR GRANTING THE WRIT

The court of appeals' judgments raise an important, broadly applicable question of federal contract law which has not been, but should be, decided by this Court. That question is whether the federal government's commercial contractual obligations are enforceable according to principles of contract law, where sovereign legislative power is not impaired. The court of appeals disregarded contract principles and ignored the petitioners' claims that direct application of the ten-year interval by statute breached the agreed limitations on the government's readjustment right. It extended *Bowen* and *Merrion* to endorse the government's use of its role as sovereign to directly adjust its commercial contractual relationships to its advantage, even where that is unnecessary to preserve sovereign power and where contract principles would prohibit the abrogation.

This Court has not decided whether the rules of *Bowen* and *Merrion* apply without qualification to the government's commercial contract relationships, or whether contract law governs at least to the point of impairing sovereign authority. Review of the first issue presented is warranted because the judgments below have immunized the government from

enforcement of its obligations where only its commercial interests are at stake.

I. THIS COURT HAS NOT DECIDED, BUT SHOULD DECIDE, WHETHER THE GOVERNMENT MAY EXERCISE ITS SOVEREIGN LEGISLATIVE POWER TO DIRECTLY AMEND THE COMMERCIAL TERMS OF ITS CONTRACTS, TO ITS ADVANTAGE AND IN CONFLICT WITH CONTRACT LAW PRINCIPLES, WHERE ENFORCEMENT OF ITS CONTRACTUAL OBLIGATIONS DOES NOT IMPAIR SOVEREIGN POWERS.

The lease agreements imposed two sets of limitations on the United States' right as lessor, acting through the BLM, to unilaterally adjust terms and conditions to its liking. First, the introductory paragraph incorporated only the terms of the MLLA as it was in effect in 1958 and 1959, as the court of appeals correctly concluded. *See* App. A-3. That paragraph also plainly stated that it incorporated only the Secretary's regulations "now in force." The lease agreements, therefore, were not made subject to subsequent legislation or regulations by that paragraph.

The government also agreed to limitations on its right to unilaterally adjust terms in section 3(d) of the agreements. It stipulated that the lessees would be notified and have thirty days to object before proposed new terms became effective.[3] In addition, exercise of the right was limited to twenty-year intervals.

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[3] The notice requirement is a precondition to a valid readjustment, not merely advisory. The attempt to readjust Trapper's leases in 1979 was vacated due to untimely notice. *Kaiser Steel Corp., et al.*, 63 IBLA 363, 367 (1982); *see also Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949, 951 (10th Cir. 1982).

If these contractual limitations on the government's right to modify any lease terms are enforceable, then the next opportunity does not arise until 1998 and 1999 because no readjustment occurred in 1978 and 1979. The enforceability turns on the proper construction of the phrase, "unless otherwise provided by law."

The petitioners contend that the phrase must be construed to mean that Congress only reserved the power to preclude or circumscribe the Secretary's authority to readjust the lease agreements, not to directly modify conditions in specific leases by legislation. The court of appeals acknowledged that "[t]he lease agreements . . . created commercial relationships governed by contract law."[4] App. A-7. It also admitted that "unless otherwise provided by law" is an ambiguous phrase having at least three possible meanings. App. A-8. Two of those meanings are inconsistent.[5] In these

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[4] Likewise, this Court described a sovereign government as a "partner in [the lessee's] commercial venture" when it entered into a mineral lease with a private party, in contrast to its separate role as sovereign. *Merrion*, 455 U.S. at 138. It also noted that the United States' contractual rights and duties "are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934) (footnote omitted).

[5] The court of appeals' opinion demonstrates the inconsistency. In two prior decisions, it construed the phrase to reserve to Congress the power to take away or circumscribe the Secretary's readjustment authority. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 501, n.9 (10th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505-06, n.6 (10th Cir. 1987); *see also* App. A-7 - A-8. In this case, the court construed the phrase to mean that Congress also reserved the power to execute the readjustment directly by legislation. App. A-9. The Court explained:

> If the Secretary had undertaken readjustments . . . in 1978 and 1979, he would have had *no choice* but to adopt the ten-year interval, ... Although the Secretary did not readjust at those times, the new interval automatically took effect then because the language [of section 6(a)]directly imposed it. (Emphasis added).

(footnote continues)

circumstances, the ambiguous phrase "should be construed most strongly against the drafter, which in this case was the United States." *United States v. Seckinger*, 397 U.S. 203, 210, 216 (1970) (footnote omitted). Accordingly, the proper construction is that Congress did not reserve the power to directly modify the twenty-year interval or any other terms in the petitioners' lease agreements by legislation.

The petitioners' construction is consistent with the rule that contracts should not be construed to immunize them from the sovereign legislative power of the United States. *Bowen*, 477 U.S. at 52-53. Unlike the State's claims in *Bowen*, the petitioners' position here does not effectively preclude Congress from enacting section 6(a) of FCLAA, nor the Secretary from imposing the terms it prescribes on the lease agreements. It merely requires the government to honor the frequency and notice limitations it placed on its right to change the twenty-year interval and other original conditions of the lease agreements. Moreover, the petitioners do not claim that the leases shield them from legislation on collateral matters, such as taxation, outside their commercial relationship with the United States as defined in the lease agreements. *Cf. Merrion*, 455 U.S. at 145-46.

The court of appeals, on the other hand, construed "unless otherwise provided by law" to be synonymous with Congress' reservation of the right to "repeal, alter, or amend" the statutes at issue in *Bowen* and the *Sinking-Fund Cases*, 99 U.S. 700 (1879). App. A-7. *See also National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. 451, 467, n.22 (1985). It has been clear for more than a century that Congress, by legislation, may directly modify the terms of contracts between the United States and other parties which are made pursuant to statutes reserving the right to

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(footnote continued)

App. A-10. If the ten-year interval applied automatically, then the Secretary had "no need" to impose it by readjustments in 1978 and 1979, rather than "no choice."

"repeal, alter, or amend" them. *Bowen*, 477 U.S. at 53. "That language expressly notified the [other party] that Congress retained the power to amend the law under which the [a]greement was executed and by amending that law to alter the [a]greement itself." *Id.* at 54 (footnote omitted). There would be no dispute in these cases if Congress had used "repeal, alter, or amend" in the MLLA in 1920, some forty years after this Court construed the phrase in the *Sinking-Fund Cases*.

But instead, Congress chose the phrase, "unless otherwise provided by law," to modify the Secretary's authority to readjust coal leases in section 7 of the MLLA. That ambiguous phrase does not equate to "repeal, alter, or amend." The court of appeals erred in effectively holding that the petitioners waived their breach of contract claims by accepting lease agreements containing "unless otherwise provided by law," on the assumption that it is synonymous with "repeal, alter, or amend."

This Court has not decided whether contractual limitations on the government's right to modify its commercial obligations, drafted by the government, are enforceable where they are modified by an ambiguous phrase such as "unless otherwise provided by law." That question is squarely presented in these cases. This Court should decide it because of two significant policy implications resulting from the judgments below.

The first policy implicated is the sanctity of the government's contractual obligations. This Court emphasized that policy in the *Sinking-Fund Cases*, stating:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

99 U.S. at 719. In dissent, Justice Strong traced the origin of that fundamental principle to Alexander Hamilton's comments to the Senate in 1795. *Id.* at 731. This Court acknowledged the continuing validity of that principle in *Bowen*, stating:

> [T]he Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, *see Perry v. United States*, 294 U.S. 330, 350-54 (1935); *Lynch v. United States*, 292 U.S. 571 (1934), ...

477 U.S. at 52.

The judgments below sweep that fundamental policy away by allowing the government to avoid its obligations based on its interpretation of an ambiguous phrase it drafted. This Court, not the court of appeals, should decide whether *Bowen* and *Merrion* are properly extended to allow the government to convert its contractual obligations into mere statutory policies, amendable at its will and without consent of the other party. *See National R.R. Passenger Corp. v. Atchison, Topeka and Santa Fe Ry. Co.*, 470 U.S. at 465-66.

Endorsement of the government's position also raises a question of basic fairness because its self-interest is at stake. The government gains a significant commercial advantage over the petitioners if it may impose FCLAA's terms in 1988 and 1989, instead of ten years later. The 12½% royalty will increase the revenue accruing to the government's side of the "commercial partnerships" by several hundred percent, among other advantages. Unlike cases involving social welfare programs such as *Bowen*, this Court has more closely scrutinized claims that a sovereign breached its contractual obligations when its financial self-interest would be served by invoking its sovereign powers to circumvent its commercial contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-26 (1977); *see also National R.R. Passenger Corp.*, 470

U.S. at 471, n.24. This is such a case where fairness requires that the government be held to a strict construction of the contractual readjustment limitations it imposed on itself in the lease agreements.

II. IF REVIEW OF ISSUE I IS GRANTED, IT SHOULD ALSO BE GRANTED ON ISSUE II BECAUSE OF THE MULTITUDE OF CLEAR ERRORS MADE IN CONSTRUING THE INTENT OF SECTION 6(a) OF FCLAA BELOW.

The second issue presented does not have as broad an impact or policy implications as significant as the first issue. If review of the first issue is granted, however, it should also be granted on the second because of the clear errors in statutory construction which support the judgments below. Petitioners will summarize the arguments they will present if review is granted on the second issue.

After holding that the government reserved the right to directly impose the ten-year interval by legislation, the court of appeals concluded that Congress intended to exercise that right by enacting the last sentence of section 6(a) of FCLAA. It based this conclusion solely on the language of that sentence,[6] interpreting it to say "that *leases* will be subject to readjustment every ten years after the first twenty-year period ends. The provision is self-executing: . . . ." (Emphasis added). App. A-10.

The actual language is:

> Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

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[6] The court of appeals did not rely on FCLAA's legislative history, but did state that one remark by Rep. Mink during the House floor debate supported its analysis of legislative intent. App. A-12 - A-13.

This sentence does not say that "leases" will be subject to readjustment at ten-year intervals, but rather that "*[s]uch rentals and royalties and other terms and conditions* of the lease will be subject to readjustment . . . ." (Emphasis added). The word "such" plainly refers to the lease conditions described in the preceding sentences of section 6(a). Those conditions include: (1) extendable primary terms of twenty years; (2) cancellation absent production in ten years; and (3) 12½% minimum surface royalties. The petitioners' lease agreements did not contain those conditions when FCLAA was enacted in 1976. Nor were they added by valid readjustments in 1978 and 1979. The last sentence of section 6(a), therefore, simply did not address the petitioners' pre-FCLAA leases. *See Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 784 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 47 (1990); *see also Franklin Real Estate Co.*, 93 IBLA 272, 278 (1986) ("[T]he language of FCLAA . . . provides no guidance concerning the readjustment period for pre-FCLAA leases."), App. A-78. Accordingly, the ten-year interval was not directly imposed by the plain language of that sentence.

Turning to FCLAA's design and legislative history, *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), neither supports the court of appeals' conclusion. FCLAA was designed to make existing leases subject to its new conditions in two situations, but only with the consent or at the request of the lessee. FCLAA, § 5(d)(5), 90 Stat. 1086, 30 U.S.C. § 202a(5) (1986) (inclusion in logical mining units); FCLAA, § 13(b), 90 Stat. 1090-91, 30 U.S.C. 203 (1976) (request for lease modification).

The legislative history is ambiguous. None of the committee reports on FCLAA discuss the question of whether the ten-year interval is intended to apply directly to existing leases, without a valid readjustment. The court of appeals inferred support from, but did not rely on, Rep. Mink's comment which it discussed in section III.B.2 of the opinion.

App. A-12 - A-13. But, the Interior Department's Solicitor found that comment ambiguous as it related to readjustment of pre-FCLAA leases. Solicitor's Opinion M-36939 at 6, 88 I.D. 1003, 1007 (1981). He also concluded that Rep. Mink misspoke when she said "ten year readjustment," instead of "twenty-year readjustment." *See id.* at n.6. Other comments made by Rep. Mink and Sen. Melcher in the floor debates suggest the intent to avoid the "sticky constitutional questions" implicated by direct application of FCLAA to existing leases. 121 Cong. Rec. 26378 (1975); 122 Cong. Rec. 488, 19377 (1976).

Moreover, the Secretary's interpretation is not entitled to deference in this case. *Cf. Chevron, U.S.A., Inc.*, 467 U.S. at 843-45. That interpretation is patently unreasonable because it makes an irrational distinction between the ten-year interval and the three other lease conditions stated in mandatory language in section 6(a). *See* App. A-19 - A-21. Also, the government's position was inconsistent for nearly ten years after FCLAA was enacted. *See, e.g., supra*, nn.1, 2. In addition, the government has a financial interest in the legal position it has taken. *See United States Trust Co. v. New Jersey*, 431 U.S. at 25-26.

CONCLUSION

For these various reasons, this petition for a writ of certiorari to the Tenth Circuit Court of Appeals should be granted.

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Supreme Court, U.S.
FILED
JUN 18 1991
OFFICE OF THE CLERK

No. 90-1940 (2)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

TRAPPER MINING INC.,
WYODAK RESOURCES DEVELOPMENT CORP.,
Petitioners,

v.

MANUEL LUJAN, JR.,
SECRETARY OF THE UNITED STATES
DEPARTMENT OF THE INTERIOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

PUBLISH

United States Court of Appeals

FOR THE TENTH CIRCUIT

Filed Jan. 15, 1991

TRAPPER MINING INC., *Plaintiff-Appellant,* v. MANUEL LUJAN, JR., NEIL MORCK, BRUCE HARRIS, AND R.W. MULLEN, *Defendants-Appellees.*	No. 89-1372 Appeal from the United States District Court For the District of Colorado (D.C. No. 88-Z-1812)
WYODAK RESOURCES DEVELOPMENT CORP., *Plaintiff-Appellee,* v. MANUEL LUJAN, JR., Secretary of the Department of Interior; and WILLIAM H. LEE, Chief, Branch of Mining Law and Solid Minerals, Wyoming State Office Bureau of Land Management, United States Department of the Interior, *Defendants-Appellants.*	No. 90-8025 Appeal from the United States District Court For the District of Wyoming (D.C. No. 89-0057J)

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Before LOGAN and MOORE, Circuit Judges, and GREENE, District Judge.*

MOORE, Circuit Judge.

In this consolidated appeal, the question before us is whether the Federal Coal Leasing Amendments Act (FCLAA) automatically converts the twenty-year readjustment interval in pre-FCLAA coal leases to ten-year intervals at the first post-FCLAA readjustment date. In a suit brought by Trapper Mining Inc., the United States District Court for the District of Colorado concluded that it does. Faced with the identical issue in a suit brought by Wyodak Resources Development

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* Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

Corp., the United States District Court for the District of Wyoming reached the opposite result, holding that the Secretary of the Interior must adopt the new interval through a readjustment. We affirm the judgment of the Colorado District Court and reverse the judgment of the Wyoming District Court.

I. FACTUAL AND LEGAL BACKGROUND

The United States, acting through the Bureau of Land Management (BLM) and the Secretary of the Interior (the Secretary), granted coal leases to Trapper Mining Inc.'s predecessor in interest[1] on June 1, 1958, and to Wyodak Resources Development Corp. on May 1, 1959. The leases provided for twenty-year intervals at which the Secretary could readjust terms, qualified by the clause "unless otherwise provided by law." Section 3(d) of each lease reserves to the lessor

> [t]he right reasonably to readjust . . . terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

The introductory paragraph of the leases also incorporates § 7 of the Mineral Lands Leasing Act (MLLA) of 1920, as amended, 30 U.S.C. § 207 (1958), which provided similarly that the leases

> shall be for indeterminate periods upon condition . . . that at the end of each 20-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary

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[1] The leases were originally issued to Utah Construction Co., later renamed Utah International Co. Utah International then subleased them to Trapper and later assigned the leases to General Electric Holdings, Inc. In 1988, General Electric assigned the leases to Trapper.

> of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

In 1976, Congress amended the law, replacing § 7 of MLLA with § 6 of FCLAA. One of the changes instituted by § 6 is a shorter readjustment interval of ten years. Section 6 provides in part that

> rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

The first scheduled readjustment opportunities for Trapper's and Wyodak's leases occurred in 1978 and 1979, respectively, the twentieth anniversaries of the leases. The BLM failed to take advantage of either of these opportunities, sending untimely notice to Trapper in 1979 and never sending actual changes in terms and conditions to Wyodak despite timely notice. The BLM subsequently notified Trapper and Wyodak (lessees) that their leases would be readjusted in 1988 and 1989, respectively, ten years after the twentieth anniversaries of the leases. The lessees objected that the ten-year interval cannot apply to their leases because the Secretary did not adopt it through a readjustment at the previous opportunities.

After the BLM and Interior Board of Land Appeals (IBLA) rejected their complaints, the lessees filed suits for declaratory and injunctive relief to prevent readjustment until 1998 and 1999. On cross-motions for summary judgment, the Colorado District Court dismissed Trapper's case in a bench ruling. However, the Wyoming District Court granted Wyodak's requested relief, also on cross-motions for summary judgment.

II. STANDARD OF REVIEW

When a matter comes to us after summary judgment, we apply the same standards employed by the trial court under Fed. R. Civ. P. 56(c). *Osgood v. State Farm Mut. Auto. Ins. Co.*, 848 F.2d 141, 143 (10th Cir. 1988). Since no material factual disputes exist, we consider *de novo* which party is entitled to judgment as a matter of law.

Section 706 of the Administrative Procedure Act, 5 U.S.C., provides the basis for our review of the Secretary's actions. We "decide all relevant questions of law," setting aside agency determinations if they are "not in accordance with the law" or are "in excess of statutory jurisdiction, authority, or limitations."

III. APPLICATION OF FCLAA

This dispute concerns the proper readjustment interval for pre-FCLAA leases, absent a readjustment by the Secretary at the first post-FCLAA opportunity. We have never faced this combination of circumstances before, but we have examined the readjustment interval and the effect of FCLAA on pre-FCLAA leases in other contexts.

In *Rosebud Coal Sales Co. v. Andrus*, a lease was due for readjustment in 1975 and the Secretary improperly attempted to readjust it two and one-half years later in 1977. We held that the Secretary waives his readjustment opportunity by failing to act, precluding readjustment until the next scheduled opportunity. 667 F.2d 949, 952 (10th Cir. 1982). The twenty-year readjustment interval gave "a right to the Government in the nature of an option to make adjustments it considers necessary or to let the opportunity pass. . . . The opportunity comes at intervals albeit long but so prescribed by Congress." *Id.* at 951.

We also established in *Rosebud* that FCLAA cannot apply to pre-FCLAA leases via pre-FCLAA readjustment opportunities. The passage of FCLAA in 1976, one year after the scheduled readjustment, did not justify the Secretary's

belated action as an effort to make the lease conform to FCLAA. Such a result would amount to a retroactive application of FCLAA which Congress never intended. *Id.* at 952.

Our next encounter with FCLAA's application to pre-FCLAA leases arose when the Secretary sought to apply FCLAA on post-FCLAA readjustment dates. In companion cases, we held that the Secretary not only can but also must impose FCLAA's mandatory terms at post-FCLAA readjustment opportunities. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496 (10th Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988); *Coastal States Energy Co. v. Hodel*, 816 F.2d 502 (10th Cir. 1987). In *FMC*, we reasoned first that the language "unless otherwise provided by law" in the original leases left the Secretary's right to readjust subject to later statutory changes by Congress. Then we noted that § 6 of FCLAA, in effect when FMC's leases came up for readjustment, required a royalty rate of not less than 12½%. We concluded that the Secretary had no choice but to impose a minimum royalty rate of 12½%. *FMC*, 816 F.2d at 501. We arrived at the same result in *Coastal* for other terms mandated by FCLAA, including the change in readjustment interval. However, the same analysis yielded a different result for the underground coal royalty rate. Section 6 excepts underground coal from the mandatory 12½% rate. Therefore, the Secretary erred in automatically applying an 8% rate without even considering a lesser one. *Coastal*, 816 F.2d at 508.

Tenth Circuit precedent thus establishes (1) when the Secretary waives a pre-FCLAA readjustment opportunity, he cannot arbitrarily choose the next readjustment interval, and (2) when the Secretary undertakes a post-FCLAA readjustment of a pre-FCLAA lease, he must adopt the readjustment interval prescribed by Congress in FCLAA.

The question before us now is whether FCLAA's ten-year readjustment interval takes effect automatically when the Secretary waives the first post-FCLAA readjustment opportunity. Applying the same two-step reasoning we used

in *FMC* and *Coastal*, we conclude that Congress has the authority to change the readjustment interval by statute and exercised that authority in FCLAA. The Secretary was thus entitled to readjust Trapper's leases in 1988 and Wyodak's in 1989.

A. Congressional Authority to Alter Interval

The lease agreements between the government and the lessees created commercial relationships governed by contract law. *Rosebud*, 667 F.2d at 951. Congress is entitled to modify such contracts through subsequent legislation unless the right is " 'surrendered in unmistakable terms.' " *Bowen v. Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (citing *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982)). The Supreme Court has repeatedly warned that interpretations of contracts which would immunize them from the sovereign power of the United States to change its laws should be avoided if possible. *Bowen*, 477 U.S. at 52-53.

In *Bowen*, the Supreme Court held constitutional an amendment to the Social Security Act which affected state contractual rights. The original Social Security Act had reserved "[t]he right to alter, amend, or repeal any provision." 42 U.S.C. § 1304. In the present cases, § 7 of the MLLA and § 3(d) of the leases reserve to Congress the power to change the readjustment interval. The leases are subject to readjustment by the Secretary every twenty years "unless otherwise provided by law" at the end of such a period. We believe that exception allows Congress to change the readjustment interval to ten years independent of any action by the Secretary.

The lessees argue that the exception only reserves to Congress control over the Secretary's right to readjust terms, not direct control over specific terms. They assume that Congress delegated control of lease terms to the Secretary, retaining only the right to alter the Secretary's power to readjust. In *FMC* and *Coastal*, we determined that the clause "unless otherwise provided by law" preserves Congress' right not

only to take away from the Secretary the power to readjust but also to circumscribe that power by requiring adoption of specific terms upon readjustment.[2] Neither *FMC* nor *Coastal* purported to limit the clause to those two meanings. As the D.C. Circuit recently noted, it can have multiple meanings:

> It might . . . modify only the phrase "and thereafter at the end of each succeeding 20-year period during the continuance of this lease," meaning that lease readjustments would take place every twenty years, unless Congress by law required them to take place at some other interval. It might, on the other hand, modify the whole of the clause that precedes it, which would presumably mean that the lessor reserves the right to readjust the lease, except that Congress may provide by law that there shall be no readjustment. It might modify the phrase "reasonably to readjust," and thus mean that the lessor reserves the right reasonably to readjust the lease, except that Congress may provide by law for a specific readjustment of its choosing, even one that would have been unreasonable for the Secretary to make on his own under the prior law.

The D.C. Circuit held that one meaning of the clause is that Congress can require the Secretary to impose certain terms on pre-FCLAA leases during readjustment. *Western Fuels-Utah,*

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[2] Specifically, we stated in *FMC*:

> We do not interpret the language in MLLA (1920), which was incorporated verbatim in the two leases here involved, as only meaning that the Secretary on an anniversary date may readjust unless the law in effect at the time of readjustment has taken that right away. It no doubt covers that possibility. But in our view it also permits Congress to allow the Secretary to continue to have the right to readjust, but at the same time circumscribe that right by enacting, for example, a revised minimum royalty rate.

Footnote 6 in *Coastal* is virtually identical. *FMC*, 816 F.2d at 501, n.9; *Coastal*, 816 F.2d at 505, n.6.

Inc. v. Lujan, 895 F.2d 780, 788-89 (D.C. Cir.), *cert. denied*, 111 S. Ct. 47 (1990). In the present cases, we hold that the breadth of the clause makes the first suggested meaning that Congress may directly change the interval equally valid.

B. FCLAA's Effect on Interval

Whether Congress intended to change the readjustment interval directly through § 6 of FCLAA is a question of statutory construction. Under *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), a court reviewing an agency's construction of a statute first makes its own inquiry into the intent of Congress on the precise issue. If that intent is ambiguous or nonexistent, then the court should defer to the agency's interpretation as long as it is reasonable. Because it is clear that Congress intended the readjustment interval to become ten years on the first post-FCLAA anniversary of pre-FCLAA leases, we need not address the lessees' attacks on the consistency of the Secretary's interpretation.

1. Text

When these leases came up for readjustment in 1978 and 1979, FCLAA was law. Section 6(a) provides in full:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12½ per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be

> subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

The final sentence of § 6(a) states that leases will be subject to readjustment every ten years after the first twenty-year period ends. The provision is self-executing: the language is mandatory and directly imposes the new interval rather than just modifying the Secretary's authority over the term. The mandatory language "will be" reflects Congress' intent to require the new interval to take effect. In *FMC* and *Coastal*, we attached similar significance to mandatory language, holding that it compels the Secretary to impose certain terms when he undertakes a readjustment.[3]

If the Secretary had undertaken readjustments for the present leases in 1978 and 1979, he would have had no choice but to adopt the ten-year interval, making the leases eligible for readjustment again in 1988 and 1989. Although the Secretary did not readjust at those times, the new interval automatically took effect then because the language directly imposed it. In contrast, the language in § 6 mandating the royalty rate only affects the Secretary's control over the term. It states that "[a] lease shall require payment of a royalty in such amount *as the Secretary shall determine* of not less than 12½ per centum." (Emphasis added.) This requirement is couched as a restriction on the Secretary's power, not as a direct imposition of the new rate.

We hold that the ten-year interval applies automatically in the absence of readjustment by the Secretary. The language not only circumscribes the Secretary's actions if he undertakes a readjustment but also dictates a certain result. The

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[3] The one exception to application of mandatory terms rests on our recognition in *Rosebud* that FCLAA cannot apply retroactively to a pre-FCLAA lease when its twenty-year anniversary occurs before 1976. However, applying the new interval to a pre-FCLAA lease on a post-FCLAA readjustment date is not retroactive because the leases are subject to change at that time. *See FMC*, 816 F.2d at 501, n. 10.

Secretary cannot thwart the intent of Congress by simply not undertaking a readjustment.

The lessees counter this analysis at two levels. First, they contend that the clause changing the interval does not apply to pre-FCLAA leases because of certain words in § 6. The clause refers to leases with "primary" terms of twenty years and requires that the lease be "extended" in order for the new interval to apply. The lessees contend that pre-FCLAA leases have indeterminate terms and do not need to be extended. However, we have previously held that the Secretary can apply FCLAA, including the new interval, to pre-FCLAA leases on post-FCLAA readjustment dates. The phrase "primary term" simply means the first twenty-year period before a lease becomes subject to readjustment. *See Western Fuels-Utah*, 895 F.2d at 784. The phrase "if extended" merely reflects that readjustments will only be appropriate while leases remain in force. *Coastal*, 816 F.2d at 505, 507. The presence of these words does not pose any special obstacle to *direct* application of the terms.

Second, the lessees insist that even if the clause is applicable to pre-FCLAA leases, the new interval cannot apply automatically because it only becomes mandatory when the Secretary undertakes a readjustment. They assume that all terms must be changed through a readjustment, and that the Secretary can waive the right to readjust any of the terms. Both steps of this analysis are flawed.

The interval must undergo readjustment, the lessees argue, because it is no different than three other mandatory terms in § 6: "A coal lease shall be for a term of twenty years . . . Any lease which is not producing in commercial quantities at the end of ten years shall be terminated . . . A lease shall require payment of a royalty . . . of not less than 12½ per centum. . . . " By focusing on this comparison, the lessees fail to see the distinction between mandatory and non-mandatory terms. We have never specifically held that mandatory terms must be readjusted to take effect. The lessees

also fail to recognize potential distinctions among the mandatory terms. For example, they conveniently ignore the key language distinguishing the royalty rate from the interval. Trapper also contrasts the language changing the interval to § 5(b) of FCLAA, 30 U.S.C. § 202(a)(5), which, Trapper contends, does directly impose terms. Section 5(b) provides that if a lessee includes a pre-FCLAA lease in a logical mining unit, then that lease "shall be subject to the provisions of this section." Trapper argues this provision demonstrates how Congress expresses intent to modify a term by law without the necessity of readjustment by the Secretary. However, this language does not preclude a finding of similar intent in the language of § 6.

Assuming the interval must go through readjustment, the lessees' next assumption is that the Secretary can waive his option to adopt the ten-year interval and did so by failing to readjust in 1978 and 1979. The lessees find the right to waive in *Rosebud's* characterization of the Secretary's right to readjust as "an option." 667 F.2d at 951. However, in *Rosebud* we did not treat the readjustment interval as a term waivable by the Secretary. Immediately after describing the right to readjust as an option, we noted that the interval is "prescribed by Congress." Implicit in *Rosebud's* holding that the Secretary can only readjust at times set by Congress is the principle that the Secretary is *entitled* to readjust at all those opportunities.

2. Legislative History

The parties have centered much attention on one remark by Representative Mink, Chairwoman of the House Subcommittee on Mines and Mining, during the House debate on FCLAA. Representative Mink stated: "The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten-year readjustment of lease terms, or upon the inclusion of an existing lease in a logical mining unit." 122 Cong. Rec. 489

(1976). Our analysis stands without reference to the legislative history, but we note that this remark, contrary to the lessees' assertions, supports our conclusion that Congress intended to change the readjustment interval by statute.

Representative Mink's statement expresses an intent for the ten-year interval to apply to pre-FCLAA leases, regardless of whether the Secretary readjusts other terms. Although the other terms of FCLAA must be "made applicable" through readjustment, Representative Mink refers to the readjustment interval as a term outside the scope of that requirement. Trapper contends that the reference to a ten-year readjustment interval merely reflects an assumption that the Secretary would validly readjust the interval period at the end of the first twenty-year term. Although this is pure speculation, such an assumption actually indicates an intent to have the new interval take effect at that time since the Secretary is required to adopt it.

IV. WAIVER AND ESTOPPEL CLAIMS OF WYODAK

Even if the ten-year interval went into effect automatically in 1979, giving the Secretary the right to readjust Wyodak's lease in 1989, Wyodak argues the Secretary lost that right through waiver or estoppel. In a letter dated February 7, 1983, the Wyoming State Office of the BLM notified Wyodak that the next readjustment would occur in 1999. In 1987, however, the Secretary asserted his intention to readjust in 1989. Since the Wyoming District Court did not rule on Wyodak's theories of waiver or estoppel, we cannot properly review their factual basis.

Both theories are legally flawed, however. Wyodak first "argues that because the Secretary's right to readjust is "in the nature of an option," *Rosebud*, 667 F.2d at 951, the Secretary holds an option contract. Under contract principles, the Secretary's letter stating that he would not exercise the option to readjust until 1999, combined with Wyodak's reliance on

that statement, terminated his option to readjust in 1989. This view of the lease as an option contract distorts the *Rosebud* court's ordinary use of the word option. An option contract is created when the offeror of the option accepts consideration in exchange for extending an irrevocable offer. *See* J. Calamari & J. Perillo, *Contracts*, § 2-25, at 121-22 (3d ed. 1987). The Secretary's option is a right reserved by Congress, not one given by the lessees in exchange for consideration.

Wyodak argues, alternatively, that the Secretary is equitably estopped from readjusting the lease in 1988. However, we disfavor the application of estoppel against the government when it thwarts enforcement of the public laws. *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984). In general, "the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (citations omitted). A party who enters an arrangement with the government and relies on an official's interpretation of the law "assume[s] the risk that that interpretation [is] in error." *Emery*, 744 F.2d at 1416; *see also Heckler v. Community Health Servs.*, 467 U.S. 51, 63, n. 17 (1983). In this case, Wyodak took the risk that the 1983 letter from a Wyoming official reflected an incorrect interpretation of the law.

V. CONCLUSION

We conclude that Congress intended the ten-year readjustment interval to apply automatically to pre-FCLAA leases on their post-FCLAA anniversaries. The Secretary thus had the right to readjust Trapper's leases in 1988 and Wyodak's in 1989. The Secretary did not lose the right to readjust Wyodak's lease through waiver or estoppel. The judgment of the United States District Court of Colorado is AFFIRMED, and the judgment of the United States District Court of Wyoming is REVERSED.

Filed Jan. 11, 1990

APPENDIX B

In The United States District Court

FOR THE DISTRICT OF WYOMING

WYODAK RESOURCES DEVELOPMENT CORP., *Plaintiff,* v. MANUEL LUJAN, JR., Secretary of the Department of Interior; WILLIAM H. LEE, Chief, Branch of Mining Law and Solid Minerals, Wyoming State Office Bureau of Land Management, United States Department of the Interior, *Defendants.*	DOCKET NO. C89-0057J

ORDER ON MOTION TO ALTER OR AMEND JUDGMENT

THE ABOVE CAPTIONED MATTER comes before this court on defendants Manuel Lujan's and several governmental agencies' January 9, 1990 Motion to Alter or Amend Judgment. This court entered judgment on December 26, 1989, ruling for the plaintiff on its motion for summary judgment. The arguments forwarded by the defendants are neither surprising nor unanticipated and, further briefing by the plaintiff not deemed necessary, may be decided on the basis of their motion and its supporting memorandum alone. The relevant facts remain the same, and the discussion of such in the court's earlier order are incorporated forthwith.

The government initially reiterates its position that Congress is the entity which has modified the readjustment interval for coal leases, and that the Secretary does not claim the authority to make such a modification. The phrasing of this contention implies that the Secretary's lack of authority to so readjust supports a finding of automatic conversion to a ten year readjustment interval. Initially, this implication is precisely the same as the argument forwarded by the government below in discussing the reasonability of the agency's interpretation of the FCLAA and it will be fully discussed below.[1]

Answering this allegation of error, however, does little to resolve the issue at hand. The essence of this court's initial ruling was that readjustment of a lease was waived for all lease terms. The fact that the Secretary does not have discretion to adjust certain lease terms outside of parameters circumscribed by Congress does not deny the mechanism by which those terms are adjusted. Certainly the government would not deny that the readjustment interval may only be changed at the time of the anniversary of a lease.

The government next contends that this court's reliance on *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), is misplaced. That reliance is criticized because *Rosebud* considered a lease whose anniversary date was prior to the enactment in 1976 of the FCLAA and because the Tenth Circuit admitted that the only issue in that case was the narrow issue of "whether by a notice given about two and one-half years after the anniversary date the Department has authority to exercise a right given it under the Mineral Leasing Act to readjust the terms of a coal lease." *Rosebud*, 667 F.2d at 950. First, the court takes notice that the "narrow" issue which the court in *Rosebud* decided has been applied in numerous cases in this circuit where the anniversary date in

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[1] Below the government poses to the court the rhetorical question, in essence, of whether the Secretary may exercise an authority by default which he has no authority to actively exercise. The contention here is identical.

question was after the passage of the FCLAA. *See, e.g., FMC Wyoming Corp. v. Hodel*, 816 F.2d 496 (10th Cir. 1987) (*Rosebud* requires that notice to readjust on a post-FCLAA anniversary date be done in a timely fashion, or it is waived); *Gulf Oil Corp. v. Clark*, 631 F.Supp. 29 (D.N.M. 1985) (*Rosebud* requires notice be given on or before post-FCLAA anniversary date); *Coastal States Energy Co. v. Watt*, 629 F.Supp. 9 (D. Utah 1985) (although *Rosebud* is not dispositive, it is instructive); *FMC Wyoming Corp. v. Watt*, 587 F. Supp. 1545 (D. Wyo. 1984) (*Rosebud* is dispositive on issue of timeliness of notice given prior to post-FCLAA anniversary date). Suggesting that the holding in *Rosebud* should be construed narrowly to apply only to pre-FCLAA anniversary dates, merely because those were the specific facts of that case, is not in accord with the decisions in this circuit.[2] The reasoning in the case has even been used by the BLM in promulgating regulations which are applicable to pre-FCLAA leases with post-FCLAA anniversary dates.

The *Rosebud* court's reasoning with regard to the timeliness of notification of readjustment is quite clear. Absent timely notification, the lease terms remain unchanged until

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[2] The defendants make much of the fact that the ten year readjustment provision is not considered by the *Rosebud* court. They note, however, that in discussing the earlier version of that section, "that the Secretary of Interior could readjust the terms of the lease 'at the end of each twenty-year period succeeding the date of the lease,' " the court stated that it was apparent that the lease had "incorporated" the provisions of the MLA. What the defendants do not say is purposefully more important than what they do say.

Their implication is that this particular provision is *automatically* incorporated into the lease. This language obviously does not mean that those provisions are incorporated in that sense, but rather that the particular lease, when drafted, incorporated verbatim several provisions of the Act. This argument is addressed more fully below.

the next valid readjustment. The relevant language cited by this court in its previous order states:

> [A] continuation of the *old royalty rate and other lease provisions* can be considered a choice then made by the administrators. When such a choice was made we find no provisions in the Act nor in the regulations permitting the Department to reverse the position it took originally at the prescribed time.

Rosebud, 667 F.2d at 952 (emphasis added). No convincing reason has been given by the government why this court should not apply this plain language in the present case, while other courts considering leases with the same characteristics as the one presently at issue have applied it.

The final argument posed by the defendants is that the decision of the IBLA is at the least a reasonable interpretation of the statute, and should be sustained on that basis. Initially, the "unless otherwise provided by law" proviso is again addressed, the argument presumably being that it is language of automatic incorporation. Notwithstanding holdings in this circuit to the contrary, the government cites language from *Rosebud* discussing the incorporation of provisions of the MLA into a coal lease.[3] If the proposition they are attempting to glean from that passage is that the Tenth Circuit recognized that certain lease terms are automatically incorporated into coal leases, they are reading that excerpt out of context. That paragraph reads:

> As might be expected, the lease adopted the statutory language of the Mineral Lands Leasing Act (30 U.S.C. § 207). The Act then provided that the Secretary of Interior could readjust the terms of the lease

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[3] It is indeed interesting that the defendants would have the court rely in part on this language in *Rosebud* to formulate this portion of its opinion, while arguing that other portions of that decision are erroneously relied on by the court due to the narrow issue with which that court was faced.

> "at the end of each twenty-year period succeeding the date of the lease." It is apparent that the lease incorporates the provisions of the Act in any event.

Rosebud, 667 F.2d at 951. The court was discussing the pertinent language in the lease, and commenting that upon drafting the lease, it incorporated the precise terms of the MLA at that time. The court did not address, as the government stresses in its initial contention, the effect of a modification of the organic legislation.

The defendant also argues that since the language of § 207 gives no authority to the Secretary to set a readjustment interval at other than 10-year periods, he can not then by default make lease terms effective for a period in excess of ten years. That reasoning would be quite compelling were it not completely incongruous with their own regulations and holdings in this circuit.[4] It is indeed paradoxical that the government admits that its untimely treatment of the readjustment of Wyodak's W-073289 lease waived the opportunity of the Secretary to increase the royalty rates between May 1, 1979 and May 1, 1989 to the minimum rate mandated by Congress in non-underground mines. That act is not discretionary. While it is true that the Secretary may adjust that rate above

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[4] 43 C.F.R. § 3451.1(c) (1988) provides that the agency must notify a lessee that a particular lease will become subject to readjustment, and the readjusted lease terms must be forwarded to the lessee within two years after the anniversary date of the lease. A failure to comply with this regulation constitutes a waiver of the Secretary's right to readjust even to the nondiscretionary, Congressionally mandated minimum royalty rate.

The District Court of Utah has held that the "unless otherwise provided by law" proviso in a coal lease does not automatically incorporate new statutes in effect at the time of readjustment into the existing lease. *Coastal States Energy Co. v. Watt*, 629 F. Supp. 9, 20 (D. Utah 1985). The Tenth Circuit affirmed decision in that case, explaining that the language circumscribes the right of the Secretary to act during readjustment. *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505-06 n.6 (10th Cir. 1987).

the minimum set by Congress, the language of the statute does not give him the authority to set a rate of less than 12½% of the value of the coal mined. *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 501 (10th Cir. 1987) ("[S]tatutory law in effect on FMC's anniversary date provided, in essence, that though the Secretary could, as before, change the previously existing royalty rate to one he determined to be proper, *the adjusted new rate could not be less than 12½% of the value of the coal.*") Yet the government agrees in its next breath that that particular mandate from Congress is not automatically included in the lease terms.

A more proper rhetorical inquiry is, then, if the Secretary lacked the authority to impose on a surface coal mine a royalty of less than the congressionally mandated minimum, could he, by default, by failing to timely readjust a lease's terms, set a royalty rate which he had no authority to set? The affirmative answer to this question compels the court to sustain its prior holding.

This court does not consider reasonable an interpretation of a statute which is not in accordance with the law, and is not bound to show deference to an agency interpretation which it deems is so. *Pueblo of Santa Ana v. Mountain States Tel.*, 734 F.2d 1402 (10th Cir. 1984).

The District Court of Colorado's decision in *Trapper Mining Inc. v. Lujan*, Civil No. 88-Z-1812, was decided on essentially the same facts as was this case, holding however that the ten year interval provision of the FCLAA was self-implementing. There are several portions of the court's oral decision which are relevant.

> And I have to distinguish in looking at this statute between the terms involving royalties, continuation of leases, [where] . . . there is a right to the Government in the nature of an option to make adjustments it considers necessary or to let the

> opportunity pass. . . . I cannot apply that discretionary logic, in looking at this statute, to the readjustment. . . .
>
> * * *
>
> I have to agree with the defendants that the Secretary has no authority to change the mandatory 10-year adjustment period by waiving it, by forgetting to readjust, or for any other reason. And the reason why I think the statute has to be differentiated between the other provision terms, the royalties, whether it's continued, and so forth, and the readjustment period, is not only because of the clear language of the statute, . . . which says that the lease will be subject to readjustment at the end of its primary term of 20 years and at the end of each 10-year period thereafter, not giving any choice, but also by the case law which has been cited by both sides and interpreted by both sides.
>
> The readjustment period itself is not subject to option; it is set by statute. . . . The statute reads that way.

(Transcript of the District Court's ruling, at 4-6).

While the district court was correct in stating that the statute "reads that way," the mandatory language of the royalty provisions also "reads that way." With all due respect, the requirement that surface coal mines pay a minimum royalty rate is not set "by discretion or option of the Secretary." It is mandated. Yet we have been informed by the courts and the agency regulations that that provision, while mandated by Congress, is waived by a failure of the Secretary to promptly readjust. The court will not ignore the logic of the Tenth Circuit's holding merely because this precise issue has not yet been raised. This court fails to see any distinction between those two mandatory provisions of the FCLAA, neither of which are discretionary functions. The drawing of such an arbitrary line does not comport with the law.

ACCORDINGLY IT IS ORDERED that the defendant's Motion to Alter or Amend Judgment be DENIED.

DATED this 11th day of January 1990.

/s/ Alan B. Johnson

UNITED STATES
DISTRICT JUDGE

Filed Dec. 20, 1989

APPENDIX C

In The United States District Court

FOR THE DISTRICT OF WYOMING

WYODAK RESOURCES DEVELOPMENT CORP., *Plaintiff,* v. MANUEL LUJAN, JR., Secretary of the Department of Interior; and WILLIAM H. LEE, Chief, Branch of Mining Law and Solid Minerals, Wyoming State Office Bureau of Land Management, United States Department of The Interior, *Defendants.*	DOCKET NO. C89-0057J

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter came before this court on appeal of a decision of the Interior Board of Land Appeals [IBLA] in favor of the defendant United States. On September 18, 1989, plaintiff filed a Motion for Summary Judgment, and the defendants filed a similar motion on October 2, 1989. Hearing on these motions was held on November 2, 1989, with Timothy Thomas representing the plaintiff and David Kubichek representing the defendants. The relevant facts are not in dispute.

Plaintiff Wyodak Resources Development Corp. [Wyodak] was issued the coal lease in question on May 1, 1959. That lease was issued pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. §§181, *et seq.* [MLA]. The terms of

leases issued at that time were controlled by § 7 of that Act, which provided in relevant part:

> "Leases shall be for indeterminate periods upon condition of diligent development and continued operation and upon *the further condition that at the end of each 20-year period succeeding the date of the lease such readjustment of the terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the expiration of such periods.* (emphasis added).

The lease issued to the plaintiff included language giving effect to this portion of §7. Section 3(d) of the lease provides that:

> "The lessor expressly reserves: . . . [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

In 1976, Congress passed the Federal Coal Leasing Amendments Act [FCLAA], amending §7 to read in pertinent part:

> "A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. . . . The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. §207(a).

It is undisputed that the coal lease was subject to readjustment on May 1, 1979. On February 7, 1979, the Bureau of Land Management informed Wyodak that the lease terms would be readjusted, and that the terms of the readjustment would be forwarded to them. The terms and conditions were never forwarded to the plaintiff. 43 C.F.R. §3451.1(d)(2), in effect at that time, provided that a failure to provide a lessee with the terms and conditions of lease readjustment within a two year period after notice constitutes a waiver of the right to readjust. The defendant informed plaintiff of the waiver by letter dated February 7, 1983. That letter stated further:

> "[W]e view that readjustment has been waived. The terms and conditions of the lease remain the same as those in the original lease. Lease W-073289 shall be subject to readjustment again on May 1, 1999.

On April 27, 1987, the BLM notified Wyodak that the lease would be readjusted on May 1, 1989. Wyodak's protest of that decision was denied by the BLM, and that denial was affirmed by the IBLA on January 12, 1989.

In denying Wyodak's protest, the IBLA found first that equitable estoppel did not apply to the government's actions in this case, because such an application would frustrate the objectives of Congress in passing the FCLAA and undermine the provisions of the applicable regulations. Second, the Board held that the 20-year readjustment interval in coal leases existing at the time the FCLAA was passed were automatically converted to 10-year intervals by the passage of the Act. The Board found that despite the Department's waiver of its right to impose new or additional terms to the lease, the waiver did not extend to waive the right of the Department to modify the period between readjustments specified by the Act.

The plaintiff presents three arguments in support of its motion. First, they contend that the decision of the IBLA was not in accordance with the law. Second, the plaintiff argues

that the government has waived any opportunity to readjust before 1999, and to do so would breach the terms of the lease. Finally, it is argued that the government is equitably estopped from readjusting the lease because the plaintiff detrimentally relied on the representation of the BLM that readjustment would next be in 1999.

The defendants contend initially that the court is limited in the available scope of review of the IBLA's action. They also deny expressly each of the plaintiff's contentions.

The plaintiff filed a reply to defendant's motion on October 13, 1989, disputing their characterization of the limited scope of review and reiterating its earlier contentions.

SCOPE OF REVIEW

The scope of review for the district court to apply when faced with a question of an agency's statutory construction is plainly established by the Supreme Court and the decisions of this circuit. This court is to show deference to an interpretation of a statute made by the officers or agency who are responsible for its administration. *Udall v. Tallman*, 380 U.S. 1, 16 (1965). This court should not overturn an administrative interpretation unless it finds that the interpretation was clearly erroneous, *York v. Secretary of Treasury*, 774 F.2d 417, 419 (10th Cir. 1985), and should uphold it if it is reasonable. *Mayoral v. Jeffco Amer. Bapt. Res.*, 726 F.2d 1363 (10th Cir. 1984) As the Supreme Court said in *Udall*, 380 U.S. at 16:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. 'To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance

in judicial proceedings.' *Unemployment Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 153.

This court need not, therefore, find that the interpretation given 30 U.S.C. §207(a) by the government is the most reasonable one, or even that this court would have interpreted it in the same way. It is enough to sustain the reading of the statute if it is reasonable and not inconsistent with congressional intent or the plain meaning of the statute. The courts are, however, the final authorities regarding any construction put on a statute, and "are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or [which] frustrates congressional policy." *Pueblo of Santa Ana v. Mountain States Tel.*, 734 F.2d 1402, 1406 (10th Cir. 1984). Within these parameters, the court will address the parties' contentions.

AUTOMATIC CONVERSION TO TEN YEAR READJUSTMENT

The plaintiff contends that the readjustment period is a term of the lease which cannot be changed absent a valid readjustment. The court is convinced that the construction given the statute by the BLM is not in accordance with the law and therefore unreasonable.

The disposition of this case is controlled by the Tenth Circuit's decision in *Rosebud Coal Sales Co., Inc. v. Andrus*, 667 F.2d 949 (10th Cir. 1982). In *Rosebud*, the court was faced with a lease whose primary twenty year anniversary occurred in 1975, prior to the passage of FCLAA. Notice of readjustment was given two and one-half years after the anniversary. The court held that the government must readjust a lease at the end of its twenty year period, if it so chose. If they failed to readjust at that time, the government will be "deemed to have waived its right to readjust for an ensuing 20-year period." 1 Am.L. of Mining §27.11 n.8 (2d ed. 1989); *FMC Wyoming Corp. v. Hodel*, 816 F.2d 496, 500 (10th Cir.

1987). The court plainly stated that lease provisions not modified by a timely readjustment could not later be changed by the Secretary.

> The time for readjustment of coal lease terms comes so infrequently that it must be assumed that timely consideration is given in the ordinary administrative process. If no action is taken by the Government for an extended time it is reasonable to assume that a decision was made not to take advantage of the opportunity provided by the Mineral Lands Leasing Act. *Thus a continuation of the* ***old royalty rate and other lease provisions*** *can be considered a choice then made by the administrators. When such a choice was made we find no provisions in the Act nor in the regulations permitting the Department to reverse the position it took originally at the prescribed time.*

Rosebud, 667 F.2d at 952 (emphasis added). The court thus held that absent a timely readjustment, a modification of royalty rates or other lease terms may not be affected. To the extent that the readjustment interval is a term, condition or provision of the lease, it may not be modified under these circumstances, either.

The BLM has, since *Rosebud*, promulgated regulations it deemed consistent with the opinion. Those regulations provide in part:

> (c)(1) The authorized officer shall, prior to the expiration of the current or initial 20-year period or any succeeding 10-year period thereafter, notify the lessee of any lease which becomes subject to readjustment after June 1, 1980, whether any readjustment of terms and conditions will be made prior to the expiration of the initial 20-year period or any succeeding 10-year period thereafter. On such a lease the failure to so notify the lessee shall mean

> that the United States is waiving its right to readjust the lease for the readjustment period in question.
>
> (2) In any notification that a lease will be readjusted under this subsection, the authorized officer will prescribe when the decision transmitting the readjusted lease terms will be sent to the lessee. The time for transmitting the information will be as soon as possible after the notice that the lease shall be readjusted, but will not be longer than 2 years after such notice. Failure to send the decision transmitting the readjusted lease terms in the specified period shall constitute a waiver of the right to readjust, unless the delay is caused by events beyond the control of the Department.

43 C.F.R. §3451.1(c) (1988).[1] Although these regulations correctly reflect the circuit court's finding that failure to notify the leaseholder that the terms will be adjusted and later of the specific terms of the readjustment constitutes waiver of the right to readjust, to the extent that the regulations suggest that pre-1976 lease are automatically converted to 10-year readjustment intervals by operation of law, the regulations are invalid as being not in accordance with the law.

The government contends, however, that the proviso, "unless otherwise provided by law," in both the MLA and the lease, allows for the incorporation into the lease of the 10-year

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[1] Wyodak also argues that the administrative regulations support its reading of §207(a). 43 C.F.R. §3451.1(a)(1) provides in pertinent part:

> All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter.

The argument is that since the BLM waived its right to readjust the terms and conditions of the lease, they remain the same until a valid readjustment has taken place. Therefore, the lease is for an indeterminate period of time and subject to readjustment after another 20 years.

(footnote continues)

readjustment interval. The law does not support such a finding. In *Coastal States Energy Co. v. Watt*, 629 F.Supp. 9 (D. Utah 1985), the district court discussed the scope of that phrase. The court found that it modified the right to readjust, giving the Secretary that right unless it had otherwise been taken away by law. *Id.* at 20. The "language does not incorporate statutes in effect at the time of readjustment." *Id.* In affirming the district court, the Tenth Circuit stated that the language also "permits Congress to allow the Secretary to continue to have the right to readjust, but at the same time circumscribes that right by enacting" revised terms or conditions of the lease. *Coastal States Energy Co. v. Hodel*, 816 F.2d 502, 505-6 n.6 (10th Cir. 1987). Thus, the language of §7 and that incorporated into plaintiff's lease allows Congress to modify the power to readjust. It does not incorporate terms absent readjustment. Such a reading is consistent with *Rosebud*. It would be patently unreasonable to allow some terms to be automatically incorporated into the lease by employing

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(footnote continued)

The court cannot agree with this interpretation. The regulation speaks of the twenty-year periods which are currently running. Construing the word "current" to mean those 20-year periods in existence now, and those which may begin at a later date if readjustment is waived by the BLM, contorts the plain meaning of the word. It assumes that a twenty year period has not run merely because there was not a timely readjustment. It is beyond contention that the Wyodak lease at issue was "subject to readjustment" on May 1, 1979. The regulation makes no distinction between leases which were subject to readjustment and were actually readjusted, and those leases subject to readjustment, but readjustment was waived by the BLM. The court will not provide such a distinction in contravention of the plain language of the regulation.

The court finds instead that the agency interpretation of the regulation, although clear, is in direct conflict with the mandate of the court in *Rosebud*. A court is not required to give deference to an agency interpretation of a statute which is not in accordance with the law. *SEC v. Sloan*, 436 U.S. 103, 117-18 (1978); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973).

this phrase, while requiring readjustment for others. Nonetheless, the government argues that the readjustment interval is one term of the lease which should be incorporated into each pre-1976 coal lease by operation of law. Certainly no such distinction is apparent in the organic legislation.

The only question remaining, then, is whether the readjustment interval is one of the "other terms and conditions of the lease" subject to readjustment. The *Rosebud* court's treatment of the readjustment interval deserves attention. In holding that the notice of readjustment at that late a date did not give the Secretary authority to readjust, the court interpreted the readjustment interval as it would a specific term of the contract.

> [I]n determining the meaning of an oil and gas lease issued under the Mineral Lands Leasing Act, we used the typical contract law doctrines applicable to commercial transactions. *In so considering all the contract provisions, and in an application of the ordinary meaning to the terms, it is not difficult to reach the conclusion that the readjustment was to be when each twenty-year period expired,* on that date and not at a later time.

Id. at 951 (citations omitted and emphasis added). The court went on to discuss the readjustment time period as any other term or condition of the contract would be analyzed, referring to the interval as "a provision selected by Congress" and a "provision of the lease." The lease language could not be more plain. It provides that the terms and conditions of the lease may not be changed absent a valid readjustment, and the readjustment interval is obviously a term or condition of the lease. Accordingly, this court holds that the readjustment interval, like any other term or condition of Wyodak's W-073289 lease, may not be modified by the Secretary absent a timely and valid readjustment.

ACCORDINGLY IT IS ORDERED that the Plaintiff's Motion for Summary Judgment be GRANTED.

DATED this 20th day of December 1989.

/s/ Alan B. Johnson
UNITED STATES
DISTRICT JUDGE

ENTERED ON
THE DOCKET
Dec. 26, 1989
(Date)

WILLIAM C. BEAMAN
Clerk

by /s/ Betty Griess
Deputy Clerk

Filed Nov. 9, 1989

APPENDIX D

In The United States District Court

FOR THE DISTRICT OF COLORADO

TRAPPER MINING INC. and GENERAL ELECTRIC HOLDINGS, INC., *Plaintiffs,* v. MANUEL LUJAN, JR., Secretary of the Department of the Interior; NEIL MORCK, Colorado State Director of the Bureau of Land Management, Department of the Interior; BRUCE R. HARRIS and R. W. MULLIN, Administrative Judges of the Interior Board of Land Appeals, Department of the Interior, *Defendants.*	CIVIL ACTION NO. 88-Z-1812

JUDGMENT OF DISMISSAL

This matter was before the Court on November 9, 1989, for oral argument on cross motions for summary judgment. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiffs' Motion For Summary Judgment is denied. It is

FURTHER ORDERED that Defendants' Motion For Summary Judgment is granted. It is

FURTHER ORDERED that the Court affirms the Department of Interior's August 12, 1989 decision. It is

FURTHER ORDERED that judgment is entered in favor of defendants and against plaintiffs for dismissal. It is

FURTHER ORDERED that the parties shall pay their own costs.

DATED at Denver, Colorado, this 9th day of November, 1989.

BY THE COURT:

/s/ Zita Weinshienk

ZITA L. WEINSHIENK,
Judge
United States District Court

In The United States District Court

FOR THE DISTRICT OF COLORADO

TRAPPER MINING INC., et al., *Plaintiffs,* vs. MANUEL LUJAN, JR., et al., *Defendants.*	CIVIL ACTION NO. 88-Z-1812

REPORTER'S TRANSCRIPT

(Hearing on Motions for Summary Judgment: Bench Ruling)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:40 a.m., on the 9th day of November, 1989, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

WELBORN, DUFFORD, BROWN & TOOLEY, by RICHARD L. FANYO, Attorney at Law, 1700 Broadway, Suite 1700, Denver, Colorado, 80290-1701, appearing for the plaintiffs.

MICHAEL G. NORTON, Acting United States Attorney, by CHALK MITCHELL, Assistant U.S. Attorney, 1961 Stout Street, 12th Floor, Denver, Colorado, 80294, appearing for the defendants.

(The arguments of Counsel are not herein transcribed, pursuant to the direction of ordering counsel. The following proceedings were then had and entered of record:)

RULING

THE COURT: Thank you. I think I thoroughly understand your position.

It appears to this court that by arguing that these leases and this scheme, Congressional scheme — whether it's a contractual relationship or whether it's regulatory, is really too simplistic. I agree that the Federal coal leasing scheme is contractual; but to go from that position and say it's contractual and therefore the plaintiff wins, or it's regulatory and therefore the defendant wins, is just too simplistic. Yes, it's contractual, but yes, it's regulated by Congress; and the question that we really need to focus on is whether the readjustment period, which is in the contract and which is addressed by Congress in the statute, is not self-implementing, as argued by the plaintiff, or whether, as argued by the defendant, it is implemented by statute, it is self-implementing because of the statute and the regulations. That's, I think, the tight issue.

We know — at least I know, because I decided a similar issue yesterday in an argument — that Congress by passing statutes can affect contracts. The case that was argued yesterday had to do with the interpretation of a Supreme Court case which changed the contractual arrangements in Social Security matters. It's not really very relevant to this issue except that the case — the Supreme Court case points out that Congress can, indeed, change contracts to which it is a party. That case is *Bowen v. Agencies Opposed to Social Security Entrapment*, which is 477 U.S. 41. But the only reason I cite it is because of the principle that there can be Congressional mandates which change contracts: in the *Bowen* case, the Social Security contract in the case I decided yesterday, a public housing contract.

If I were to accept the plaintiffs' argument in this case, it would mean that the Secretary, by failing to act or by choosing not to act, can give effect to a 20-year readjustment

period, contrary to this statute. If I were to accept the argument that this readjustment period is not self-implementing, it would mean that it would be up to the discretion of the Secretary to decide by acting or not acting whether there was going to be a 10-year readjustment period, as the statute states, or a 20-year readjustment period.

In looking at the statute carefully — and it has been pointed out to the Court that although I think the 1979 regulation is very confusing, at least initially there was a '76 regulation which went along with the defendant's position and apparently which was argued and contested in this *GE* case, because in the *GE* case, there is a footnote which points out that the appellants there argued at some length regarding the applicability of the 1979 modification.

In any case, this court, after reading the statute carefully — and I think that's really what we have to read — and by reading the Tenth Circuit cases, which do not rule precisely on this point but skirt around it, would have to rule that although the royalty provisions and whether the lease is going to be continued are discretionary in the Secretary. In other words, although the Secretary can let a period pass, a readjustment period pass, the Secretary does not have discretion when it comes to the readjustment period.

And I have to distinguish in looking at this statute between the term involving royalties, continuation of leases, the discussion, for example, in *Hodel,* where it says that there is a right to the Government in the nature of an option to make adjustments it considers necessary or to let the opportunity pass. That's exactly correct when it comes to the royalty terms, the continuation of the lease, and those lease provisions. But I cannot apply that discretionary logic, in looking at this statute, to the readjustment—the time of the readjustment period, the number of years, which appears clearly from the language of the statute to be mandated by statute. The

statute itself says that the primary term will be 20 years and that the readjustment period after that will be a 10-year period, if the lease is extended.

The case law seems very clearly to indicate that this period, this readjustment period, is set not by discretion or option of the Secretary but by Congress. The interval, therefore, this court concludes—the interval period, the readjustment period, is set by Congress, not by the Secretary, not by the Secretary choosing to waive or forgetting to act or any other action. I read the statute as saying that the Secretary has no authority. I have to agree with the defendants that the Secretary has no authority to change the mandatory 10-year adjustment period by waiving it, by forgetting to readjust, or for any other reason. And the reason why I think the statute has to be differentiated between the other provision terms, the royalties, whether it's continued, and so forth, and the readjustment period, is not only because of the clear language of the statute, which seems to indicate that, which says that the lease will be subject to readjustment at the end of its primary term of 20 years and at the end of each 10-year period thereafter, not giving any choice, but also by the case law which has been cited by both sides and interpreted by both sides.

And for example, in *Rosebud Coal Sales, Inc. v. Andrus,* even though not ruling on this precise issue, there is very strong dictum which says that the interval period, the readjusting period, in other words, is prescribed by Congress. And that's on page 951 of the opinion, and we read that. It talks earlier in that paragraph about option to make adjustments it considers necessary; but it seems to this court to be very clear that that is referring to the royalties, the continuation, and the—and the areas where there is an option to the Secretary. The readjustment period itself is not subject to option; it is set by statute. *Rosebud* says that. The statute reads that way; and public policy, it would seem to this court, dictates that the Secretary does not under this statutory

scheme have the authority to waive readjustment and therefore extend that period, a later period to 20 years, even though the statute is very clear that it shall be, mandatory, 10 years.

For the reasons that I've stated, the Court interprets this readjustment period to be self-implementing by statute and not to be implemented only in the discretion or the option of the Secretary and therefore concludes in this case that there was a 10-year period, not a 20, which ends in 1988; and therefore the motion for summary judgment by Defendant is granted and the motion for summary judgment by Plaintiff is denied. And the Court will affirm the Department of Interior's decision, which I believe is August 12, '88. Do I have the right date?

MR. FANYO: That is correct.

THE COURT: That is affirmed. That, I think, ends this case, unless there is any remaining issues that anybody can see. I can't see any remaining issues; and the ultimate decision, if your client chooses, Mr. Fanyo, is to let the Tenth Circuit look at some of these issues again, if you feel strongly, and to appeal this decision that I've made on the motions for summary judgment.

MR. FANYO: Thank you, your Honor. I have nothing further.

THE COURT: Okay. Thank you for your briefs and your presentation. This has been an interesting issue. And this case, having been decided on summary judgment, will be terminated, is dismissed.

MR. MITCHELL: Thank you, your Honor.

THE COURT: Thank you, and the Court is in recess.

(Thereupon, the hearing was concluded and the Court recessed at 9:50 a.m.)

* * * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 15th day of November, 1989.

/s/ Paul A. Zuckerman

Paul A. Zuckerman

APPENDIX E

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

WYODAK RESOURCES DEVELOPMENT CORP.

IBLA 87-586 Decided January 12, 1989

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, to readjust coal lease W-073289.

Affirmed.

1. Estoppel—Federal Employees and Officers: Authority to Bind Government

   The application of the doctrine of equitable estoppel against the Federal Government is justified only if doing so does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation.

2. Coal Leases and Permits: Leases—Coal Leases and Permits: Readjustment

   The 20-year readjustment interval stated in coal leases issued prior to enactment of the Federal Coal Leasing Amendments Act of Aug. 4, 1976, 30 U.S.C. §§ 201, 209 (1982), was converted to a 10-year readjustment interval by that Act. Although a failure to provide timely notice of readjustment at the end of a 20-year period is treated as a Departmental waiver of its right to impose new or additional terms and conditions, this waiver does not extend to the period between readjustments set by the Act, and a

> lease may be readjusted at the end of the next 10-year readjustment period.

APPEARANCES: Timothy L. Thomas, Esq., Rapid City, South Dakota, for appellant.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Wyodak Resources Development Corporation (Wyodak) has appealed from a May 29, 1987, decision of the Wyoming State Office, Bureau of Land Management (BLM) dismissing Wyodak's protest of BLM's notice that Federal coal lease W-073289 would be subject to readjustment on May 1, 1989, pursuant to 43 CFR 3451.

Coal lease W-073289 was issued effective May 1, 1959, to Wyodak pursuant to section 7 of the Mineral Leasing Act (MLA) of 1920, 30 U.S.C. § 207 (1952).[1] Section 3.(d) of lease W-037289 provides

> [t]he right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of expiration of any such period. Unless the lessee files objections to the proposed terms or a relinquishment of the lease within 30 days after receipt of the notice of proposed terms for a 20 year period, he will be deemed to have agreed to such terms.

In 1976, the Federal Coal Leasing Amendments Act (FCLAA), 30 U.S.C. §§ 201-209 (1982), was enacted, imposing new and additional conditions upon subsequently issued Federal coal leases. These conditions were also imposed upon

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[1] The lease contains 320 acres in T. 50 N., R. 71 W., sixth principal meridian, Campbell County, Wyoming.

pre-FCLAA leases, effective the date of readjustment of those leases.

On February 7, 1983, the Wyoming State Office, BLM, sent a letter to Wyodak, notifying Wyodak that the right of readjustment of the terms and conditions of lease W-073289 had been waived by BLM. The letter stated:

> Federal coal lease W-073289, issued May 1, 1959, was subject to readjustment of terms and conditions on May 1, 1979. On February 7, 1979, we notified you of our intention to readjust. The readjusted terms and conditions were never forwarded to your company.

Regulations in effect on May 1, 1979 (43 CFR 3451.1(d)(2)) state:

> "In any notification that a lease will be readjusted under this subsection, the authorized officer shall prescribe when the notice of readjusted lease terms shall be transmitted to the lessee. This time shall be as soon as possible after notice that the lease shall be readjusted, but shall not be longer than 2 years after such notice. Failure to transmit the notice of readjusted lease terms in the specified period shall constitute a waiver of the right to readjust, unless the delay is caused by events beyond the control of the Department."
>
> In light of these regulations and the fact that we did not forward terms and conditions to you before May 1, 1981, we view that readjustment has been waived. The terms and conditions of the lease remain the same as those in the original lease. Lease W-073289 shall be subject to readjustment again on May 1, 1999.

By decision of April 27, 1987, BLM notified appellant that lease W-073289 was again subject to readjustment pursuant to the provision of 43 CFR 3451, and that a decision

containing the readjusted terms and conditions would be forwarded to Wyodak on or before May 1, 1989. The decision also stated:

> [The] lease's terms and conditions were ripe for readjustment on May 1, 1979. However, prior to the end of the first 20-year period, this office failed to inform the lessee of record, Wyodak Resources Development Corporation, that the lease terms and conditions would be readjusted, thereby causing the government to waive readjustment of this lease until the end of the next readjustment period set by regulation, May 1, 1989.

On May 26, 1987, appellant filed a protest to BLM's notice of intent to readjust the lease terms as of May 1, 1989, asserting that its lease was not subject to readjustment until May 1, 1999. The basis for this objection is the February 7, 1983, letter quoted above.

The May 29, 1987, BLM decision was then issued. BLM stated that its decision of February 7, 1983, which set the next readjustment date at May 1, 1999, was in error and denied the Wyodak protest. BLM found that, under FCLAA requirements, a lease issued prior to the enactment of FCLAA is subject to readjustment at the end of its primary 20-year term and at the end of each subsequent 10-year period. BLM stated that Wyodak's lease was therefore ripe for readjustment on May 1, 1989.

Wyodak has sought review of that May 29, 1987, decision, contending that BLM is estopped from readjusting the terms of its lease until May 1, 1999. Relying on the Tenth Circuit Court of Appeals decision in *Rosebud Coal Sales Co. v. Andrus*, 667 F.2d 949 (10th Cir. 1982), appellant asserts that the Government's right to readjust its lease is in the nature of an option, and that BLM chose not to exercise that option in 1979. Wyodak further contends that under the authority of *Rosebud*, and by reason of the statements made

in the February 7, 1983, letter, BLM waived its right to readjust the terms of appellant's lease in 1989.

Appellant states its opinion that, assuming FCLAA gave BLM the right to readjust the lease terms on May 1, 1989, in the February 7, 1983, letter BLM specifically waived its option to readjust in 1989. Wyodak contends: "BLM as the optionee under the option contract has manifested an assent to discharge its right to readjust the terms of the lease in 1989, if it has that right." Appellant further contends that BLM's promise to forego readjustment of lease terms until May 1, 1999, is binding on BLM because Wyodak relied on the BLM promise when it entered into business arrangements and long term contracts based on the understanding that the terms of the lease, including the royalty amount, would remain unchanged until May 1, 1999.

Appellant also argues that BLM has failed to follow its own rulings and interpretations. Appellant contends:

> The BLM waived its right to readjust as of May 1, 1979 as set forth in the February 7, 1983 letter by failure to comply with the regulations in force at the time. Therefore the "current 20 year period" referred to is that 20 year period from May 1, 1979 to May 1, 1999, as, by failing to timely readjust in May of 1979, the 20 year period provided for under the original lease was renewed for another 20 years.

Appellant concludes by arguing that once BLM has made an interpretation of its own regulations it is then bound by that interpretation, which cannot be capriciously repudiated.

[1] The primary issue on appeal is whether BLM is now barred from readjusting the terms and conditions of Wyodak's coal lease by the statement that the lease will not be readjusted until 1999. Appellant argues that BLM is equitably estopped from imposing new terms and conditions effective May 1, 1989.

The doctrine of equitable estoppel is designed to protect the legitimate expectations of parties who have relied upon the conduct of another to their own detriment. *Russell v. Texas*, 238 F.2d 636, 640 (9th Cir. 1956), *cert. denied*, 354 U.S. 938 (1956). As we noted in *Jeffery Ranches, Inc. v. BLM*, 102 IBLA 379 (1988), the Board will recognize estoppel against the Government in appropriate circumstances. However, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. *See Raymond T. Duncan*, 96 IBLA 352 (1987); *Edward L. Ellis*, 42 IBLA 66 (1979).

In *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917), the Supreme Court held: "The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit." *Id.* at 408-09. *See also Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947). Subsequent to the decision in *Utah Power & Light* the all encompassing doctrine quoted above has been somewhat eroded by subsequent decisions. However, the doctrine is applied with much reluctance and only in cases where to invoke equitable estoppel would "not interfere with the underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation." *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980).

At the time the lease was issued, section 7 of 1920, provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

In 1976, section 7 of MLA was amended by section 6 of FCLAA, 30 U.S.C. § 207(a) (1982), to read in pertinent part:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. * * * The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years *and at the end of each ten-year period thereafter if the lease is extended.* [Emphasis added.]

Thus, prior to the enactment of FCLAA, Federal coal leases were issued for an indeterminate duration subject to 20-year readjustment intervals. FCLAA amended the Mineral Leasing Act to provide the leases would issue with 20-year primary terms subject to readjustment at the end of that term and at the end of each subsequent 10-year period.

In *Franklin Real Estate Co.*, 93 IBLA 272 (1986), a case which presented similar facts, the Board considered the meaning of "next appropriate period" as it related to pre-FCLAA leases when BLM had waived readjustment after the expiration of the 20-year period in effect when FCLAA was passed, and stated:

> In our analysis we look first to the language of FCLAA, but it provides no guidance concerning the readjustment period for pre-FCLAA leases. Next, we turn to the legislative history of that Act. There we find the remarks of Representative Patsy T. Mink, Chairman of the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, who stated:
>
> > In summary, Mr. Chairman, let me emphasize that the provisions of H.R. 6721 are intended to correct the inadequacies of present

> law which permit the speculative holding of leases and provide a poor return to the public. *The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten year readjustment of lease terms,* or upon the inclusion of an existing lease in a logical mining unit.
>
> 122 Cong. Rec. 489 (1976). This statement is a clear expression of Congressional intent that pre-FCLAA leases be subjected to the periodic 10-year readjustment of lease terms. [Emphasis added.]

Id. at 278-79.

On October 15, 1976, the Department issued proposed rulemaking. *See* 41 FR 45573. The proposed rules addressed the readjustment period as follows:

> (6) 43 CFR 3522.2-1 is amended to read as follows:
>
> § 3522.2-1 Terms and conditions.
>
> * * *
>
> (b) *Coal.* All coal leases will be subject to readjustment at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter.

This proposed regulation did not distinguish between pre-FCLAA and post-FCLAA leases, or recognize that some coal leases had been issued more than 20 years prior to enactment of FCLAA. The regulation was adopted without change or comment. *See* 41 FR 56646 (Dec. 29, 1976).

More comprehensive coal lease readjustments regulations were subsequently proposed. *See* 44 FR 16800 (Mar. 19, 1979). The proposed language of 43 CFR 3451.1(a) provided that:

> All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter. All leases issued after August 4, 1976, shall be subject to readjustment at the end of the first 20-year period and each 10-year period thereafter, if the lease is extended.

44 FR 16832 (Mar. 19, 1979). The language of 43 CFR 3451.1(a)(1) was subsequently adopted as initially proposed. 44 FR 42635 (July 19, 1979). The Department specifically provided that all leases issued prior to August 4, 1976 (pre-FCLAA leases), would be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter. 43 CFR 3451.1(a)(1). This regulation, which was in effect when the February 7, 1983, letter was sent to Wyodak, clearly reflected congressional intent.

In *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984), the court stated that application of the doctrine of equitable estoppel is justified only where "it does not interfere with underlying Government policies or unduly undermine the correct enforcement of a particular law or regulation." The judicial (and quasi-judicial) process should not invoke the doctrine of estoppel if doing so would undermine the purpose of a statute expressing the will of Congress. *Chi Li v. INS*, 749 F.2d 1469 (10th Cir. 1984).

The statement in the February 7, 1983, BLM letter to Wyodak that the readjustment period would not again arise until 1999 was contrary to the intent of Congress when enacting FCLAA and the regulations in effect at the time the letter was sent. In effect, the statement was in error. To now state that BLM is estopped from considering readjustment would frustrate the intent of Congress when enacting FCLAA and undermine the provisions of 43 CFR 3451.1(a). Therefore, we find it inappropriate to invoke estoppel against BLM in this case.

[2] The next issue to be considered is whether Federal coal lease W-073289, which was not readjusted by BLM on May 1, 1979, the end of its initial 20-year period, is again subject to readjustment on May 1, 1989.

The Board has held that the failure to provide notice of readjustment prior to the end of the 20-year lease term constitutes a waiver of the right to readjust. *Franklin Real Estate Co., supra*; *Kaiser Steel Corp.*, 63 IBLA 363 (1982). The Board has also stated, however, that waiver of the right to readjust relates only to the readjustment period in question, and the Department may readjust the lease at the "next appropriate period" in accordance with procedural guides then in existence. *Franklin Real Estate Co., supra* at 278; *Consolidation Coal Co.*, 87 IBLA 296, 303 (1985).

Appellant argues that it was in its second 20-year period when it was notified of readjustment, and, therefore, its "current" 20-year period does not expire until May 1, 1999. We construe the applicable regulations to be consistent with the express congressional intent that pre-FCLAA leases converted to 10-year readjustment periods. When the Department published the regulations in 1979, it assumed that all pre-FCLAA leases whose 20-year terms had expired after August 4, 1976, would be subject to readjustment. At the time of passage of FCLAA, W-073289 was in its first 20-year period. When the period expired on May 1, 1979, W-073289 automatically converted to a 10-year readjustment schedule. Although the readjustment of the terms and conditions were waived, BLM was entitled to readjust appellant's lease at the expiration of the 10-year adjustment period upon timely notice.

Appellant has requested a hearing, but has raised no issues of material fact. A hearing is not necessary in the absence of a material issue of fact, which, if proven, would alter the disposition of this appeal. *See Stickelman v. United States*, 563 F.2d 413, 417 (9th Cir. 1971). Therefore, we deny appellant's request for a hearing.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ R. W. Mullen

R. W. Mullen
Administrative Judge

I concur:

/s/ Gail M. Frazier

Gail M. Frazier
Administrative Judge

APPENDIX F

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

GENERAL ELECTRIC HOLDINGS, INC.
TRAPPER MINING, INC.

IBLA 86-1576, 88-156 Decided August 12, 1988

Appeals from decisions of the Colorado State Office, Bureau of Land Management, denying protests of notices to lessee of record of readjustment date for coal leases and proposed readjusted terms and conditions. C-07518, C-07519.

Affirmed.

1. Coal Leases and Permits: Leases — Coal Leases and Permits: Readjustment

   For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of sec. 6 of the Federal Coal Leasing Amendments Act of 1976, codified at 30 U.S.C. § 207 (1982), whose 20-year readjustment period expires after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval.

2. Coal Leases and Permits: Leases — Coal Leases and Permits: Readjustment

   BLM may incorporate language in a readjusted coal lease which makes termination of liability under the lease bond contingent on reclamation of all lands the surface of which has been disturbed, including land within a permit area, where Departmental regulations allow BLM, on its own or at the lessee's instigation, to release liability under the bond to the extent it covers reclamation obligations within a permit area.

APPEARANCES: Richard L. Fanyo, Esq., Denver, Colorado, for appellants; Lowell L. Madsen, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

General Electric Holdings, Inc. (General Electric), and Trapper Mining, Inc. (Trapper), have appealed from two decisions of the Colorado State Office, Bureau of Land Management (BLM). The first, dated July 16, 1986, denied their protest of a June 2, 1986, BLM notice informing General Electric, the lessee of record under coal leases C-07518 and C-07519, that the two leases would be readjusted "on June 1, 1988."[1] The second, dated November 18, 1987, denied their protest of an August 5, 1987, BLM notice informing General Electric of the proposed readjusted terms and conditions for coal leases C-07518 and C-07519. The appeals were docketed as IBLA 86-1576 and IBLA 88-156, respectively. On February 29, 1988, General Electric and Trapper filed a motion to consolidate the two appeals. Because the primary issue in both appeals is identical, we hereby consolidate the appeals for decision.

Effective June 1, 1958, BLM issued coal leases C-07518 and C-07519 to the Utah Construction Company, pursuant to section 2(a) and (b) of the Mineral Leasing Act, *as amended*, 30 U.S.C. § 201 (1958). At the time of issuance,

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[1] General Electric and Trapper, along with Utah International, Inc. (Utah International), then the lessee of record under coal leases C-07518 and C-07519, originally appealed from a June 5, 1984, BLM decision which essentially restated BLM's position, expressed in an Aug. 3, 1982, notice, that the two leases would be subject to readjustment on June 1, 1988. Concluding that neither the June 1984 decision nor the August 1982 notice constituted a binding expression of BLM's intention to readjust the leases on June 1, 1988, thereby adversely affecting the appellants within the meaning of 43 CFR 4.410(a), we dismissed the appeal without prejudice in a Dec. 31, 1984, order (*Utah International, Inc.*, IBLA 84-807).

section 7 of the Mineral Leasing Act, 30 U.S.C. § 207 (1958), provided that coal leases would be issued upon condition "that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods."[2] Subsequent to issuance of the two leases, the Utah Construction Company changed its name to Utah International.

By notice dated September 12, 1979, after the expiration of the initial 20-year period following issuance of the leases, BLM informed Utah International that it intended to readjust, in accordance with the Federal Coal Leasing Amendments Act of 1976 (FCLAA), P.L. 94-377, 90 Stat. 1083 (1976), the terms and conditions of the leases effective December 2, 1979. Utah International subsequently appealed to the Board from a February 11, 1980, BLM decision readjusting lease terms and conditions effective December 1, 1979, as proposed, and denying Utah International's objections thereto. In *Kaiser Steel Corp.*, 63 IBLA 363 (1982), relying on the opinion in *Rosebud Coal Sales Co.* v. *Andrus*, 667 F.2d 949 (10th Cir. 1982), the Board set aside a number of BLM decisions, including the February 1980 decision issued to Utah International, because BLM had failed to notify the lessees of record that BLM intended to readjust the terms and conditions of the leases prior to the expiration of the 20-year period following issuance of the leases, or prior to the expiration of a succeeding 20-year period. The Utah International case was remanded to BLM, which then issued

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[2] This statutory provision was incorporated into section 3(d) of the two coal leases (Form 4 696 (October 1956)), which reserved to the United States the

> "right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period."

an August 3, 1982, notice which stated: "As a result of the above-cited IBLA decision, the terms and conditions of coal leases C-07518 and C-07519 remain as issued effective June 1, 1958. Pursuant to regulation 43 CFR 3451.1(a)(1), these leases are subject to readjustment on June 1, 1988."

Effective April 1, 1983, BLM approved a sublease of coal leases C-07518 and C-07519 from Utah International to Trapper. Subsequently, BLM approved an assignment of the record title interest in the two coal leases from Utah International to General Electric, effective February 1, 1986. The record title interest which was transferred included all of Utah International's interests in the sublease to Trapper.

By notice dated June 2, 1986, BLM informed General Electric that coal leases C-07518 and C-07519 would be readjusted on June 1, 1988, stating:

> Notice is hereby given that the terms and conditions of the leases will be readjusted pursuant to Sec. 3(d) of each lease and the provisions of 43 3451. The proposed readjusted terms and conditions will be forwarded to you within two years of your receipt of this notice.

On July 2, 1986, General Electric and Trapper protested the June 1986 BLM notice, contending that the two coal leases would not become subject to readjustment until June 1, 1998, *i.e.*, the expiration of the second 20-year period following issuance of the leases, in accordance with section 3(d) of the leases.

In its July 1986 decision, BLM denied the protest of General Electric and Trapper to the June 1986 BLM notice, concluding that coal leases C-07518 and C-07519 would be readjusted on June 1, 1988. BLM stated that this readjustment date, which was 10 years after the initial 20-year period following issuance of the leases, was in accordance with section 6 of FCLAA, which had amended section 7 of the Mineral Leasing Act, 30 U.S.C. § 207 (1982), on August 4, 1976.

Section 6 of FCLAA provides that a coal lease "will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." 30 U.S.C. § 207(a) (1982).

On October 2, 1987, General Electric and Trapper protested an August 5, 1987, BLM notice of proposed readjusted terms and conditions, contending first that the leases were "next subject to readjustment on June 1, 1998, not June 1, 1988." General Electric and Trapper also objected generally to the imposition of FCLAA-mandated terms and conditions on pre-FCLAA leases and specifically to various proposed readjusted terms and conditions. In its November 1987 decision, BLM denied the protest of General Electric and Trapper to the August 1987 notice, again concluding that it was proper to readjust coal leases C-07518 and C-07519 on June 1, 1988. BLM also overruled all of the objections raised in the protest. Attached to the November 1987 BLM decision were executed copies of a "Coal Lease Readjustment" for both coal leases, effective June 1, 1988.

[1] This case raises the question of whether a coal lease whose initial 20-year period for readjustment expired after passage of section 6 of FCLAA on August 4, 1976, but was not then readjusted, thereafter becomes subject to readjustment at 10-year intervals, in accordance with that statute. The Board addressed that same question in *Franklin Real Estate Co.*, 93 IBLA 272 (1986). We concluded that when the 20-year period expired after August 4, 1976, the coal lease "automatically converted to a 10-year readjustment schedule," in accordance with the intent of Congress in passing section 6 of FCLAA. *Franklin Real Estate Co., supra* at 280. We based that conclusion on the words of Representative Patsy T. Mink, Chairman of the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs and one of the chief sponsors of H.R. 6721, which ultimately became FCLAA. She had stated that existing leases would be unaffected by the bill " 'except to the extent its provisions are

made applicable upon the periodic 10-year readjustment of lease terms.' " *Franklin Real Estate Co., supra* at 279 (quoting from 122 Cong. Rec. 489 (1976)) (emphasis omitted). We found that her statement was a "clear expression of Congressional intent that pre-FCLAA leases be subjected to the periodic ten-year readjustment of lease terms." *Franklin Real Estate Co., supra* at 279. Judicial review of that decision was not sought.

In their statements of reasons for appeal (SOR), appellants' principal argument is that *Franklin* was erroneously decided. They contend that the 20-year readjustment intervals originally set forth in section 3(d) of appellants' leases are terms and conditions of the existing leases which must be modified by a valid readjustment. To hold that section 6 of FCLAA itself modified that part of the lease terms and conditions, they argue, is not consistent with congressional intent, breaches the existing lease terms and conditions, is arbitrary, capricious, and an abuse of discretion, and constitutes an unconstitutional taking of property and a violation of due process. Appellants conclude that, having failed to readjust appellants' leases as of the expiration of the initial 20-year period as a result of the decision in *Kaiser Steel*, BLM must now wait until June 1, 1998, *i.e.*, the expiration of the second 20-year period following issuance of the leases, at which time BLM may properly readjust lease terms and conditions, including that affecting the extent of subsequent readjustment periods.

After carefully reviewing appellants' arguments and our decision in *Franklin*, we are not persuaded that *Franklin* was erroneously decided. Thus, we conclude that, following passage of FCLAA, appellants' leases automatically became subject to readjustment at the end of each 10-year period following the end of the initial 20-year readjustment period. That occurred by operation of law. It is immaterial that BLM

was not able to readjust the terms and conditions of appellants' leases at the end of the initial 20-year period as a result of the decision in *Kaiser Steel*.[3]

Our interpretation of the effect of section 6 of FCLAA on readjustment intervals is consistent with implementing Departmental regulations issued following passage of FCLAA. As noted by the Solicitor, prior to the expiration of the initial 20-year readjustment periods of appellants' leases, the Department had promulgated 43 CFR 3522.2-1(b) (41 FR 56646 (Dec. 29, 1976)), which stated that: "All coal leases will be subject to readjustment at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter." This regulation was in effect at the time of the expiration of the initial 20-year periods of appellants' leases. As the Solicitor points out, the regulation "did not distinguish between leases issued before and after FCLAA" (Answer at 5). Also, the regulatory language indicates that the Department regarded the statutory provision for 10-year readjustment intervals as taking effect, with

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[3] Appellants note, however, that, following the Board's decision in *Kaiser Steel* setting aside BLM's attempted readjustment of appellants' leases after the expiration of their initial 20-year periods, BLM issued an Aug. 3, 1982, notice to Utah International, which stated that "the terms and conditions of coal lease C-07518 and C-07519 remain as issued effective June 1, 1958." Thus, appellants argue that BLM's July 1986 decision unilaterally vacated that notice, thereby violating appellants' "due process rights" (SOR at 13). Appellants' argument is clearly based on the premise that, by virtue of its July 1986 decision, BLM itself had changed the readjustment interval. However, as noted *infra*, that occurred by operation of law at the expiration of the initial 20-year readjustment periods of appellants' leases. Moreover, we note that the August 1982 notice, to which appellants refer, itself stated that the leases would be "subject to readjustment on June 1, 1988."

respect to pre-FCLAA leases already in their "first 20-year period," at the expiration of that period.[4]

The regulation was modified slightly in 1979 (44 FR 42635 (July 19, 1979)). The modification, as carried through to the present regulation, 43 CFR 3451.1(a)(1), specifically applies to leases "issued prior to August 4, 1976" and in that context provides for readjustment "at the end of the current [whether the initial or succeeding] 20-year period and at the end of each 10-year period thereafter." Thus, the modification merely recognized that some coal leases were in a subsequent 20-year period at the time of passage of FCLAA.

At all pertinent times relating to the leases in question, the regulations provided for the 10-year readjustment interval. Moreover, as we held in *Franklin*, the 10-year readjustment period was imposed by the statute itself.

For these reasons and in accordance with our decision in *Franklin*, we conclude that, in its July 1986 and November 1987 decisions, BLM properly denied appellants' protests challenging BLM's conclusion that coal leases C-07518 and C-07519 became subject to the readjustment of terms and conditions on June 1, 1988, which was 10 years after the expiration of the initial 20-year period following issuance of the leases.

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[4] Appellants argue at some length regarding the applicability of the Department's July 19, 1979, modification of 43 CFR 3522.2-1(b) (41 FR 56646 (Dec. 29, 1976)), which became 43 CFR 3451.1(a)(1) (44 FR 42635 (July 19, 1979)). They contend that the modification itself improperly imposed a 10-year readjustment interval on appellants' leases, which were then in their second 20-year readjustment period. Appellants ignore, however, the fact that the applicable regulation in effect at the time of expiration of the initial 20-year periods of the leases (43 CFR 3522.2-1(b)) reflected the Department's interpretation of the effect of the statute.

Next, we turn to appellants' objections to BLM's proposed readjustment of the actual terms and conditions of coal leases C-07518 and C-07519. We note that appellants admit in their SOR filed in IBLA 88-156 that virtually all of the arguments raised by them therein have been rejected in prior Board decisions and by the Tenth Circuit Court of Appeals in *FMC Wyoming Corp. v. Hodel,* 816 F.2d 496 (10th Cir. 1987), *cert. denied,* 108 S. Ct. 772 (1988), and *Coastal States Energy Co. v. Hodel,* 816 F.2d 502 (10th Cir. 1987). Nevertheless, appellants assert that they are presenting these arguments in order to preserve them for a possible appeal in the United States District Court for the District of Columbia. Appellants state that several cases are presently pending in that court which present the same or similar arguments. Appellants assert that court is not bound by the opinions of the Tenth Circuit Court of Appeals. We perceive no need to address those arguments previously considered and rejected by the Board. However, we will discuss two additional arguments raised by appellants.

Appellants argue that they are entitled to have the case remanded to BLM for a determination pursuant to 43 CFR 3473.3-2(a)(3) whether "conditions warrant" a royalty rate less than 8 percent for coal mined by underground methods, in accordance with the court's opinion in *Coastal States Energy Co. v. Hodel, supra.* Departmental regulation 43 CFR 3473.3-2(a)(3) provides that BLM may set the royalty rate for coal mined by underground methods at an amount less than the minimum 8 percent, "but in no case less than 5 percent if conditions warrant." In *Coastal States Energy Co. v. Hodel, supra,* the court concluded that it was error for BLM to automatically set a readjusted royalty rate at 8 percent for coal mined by underground methods where 43 CFR 3473.3-2(a)(3) permits a "lesser amount," and, accordingly, remanded the case for further proceedings, including a determination whether a lesser amount was warranted in that case.

BLM stated in its November 1987 decision, at page 3: "Coal leases C-07518 and C-07519 contain both surface and underground coal reserves. The lessee currently is mining only surface coal, however, and its mine permit package presently contains no definite proposal for mining the underground reserves." *See also* SOR (IBLA 88-156) at 2. Appellants do not challenge BLM's statement.[5] BLM properly set the readjusted royalty rate for coal mined by underground methods at 8 percent and we decline to remand the case to BLM for a determination whether a lesser amount is warranted. *See Ark Land Co.*, 97 IBLA 241, 247 (1987).

Appellants also object to section 10 of their readjusted leases to the extent it provides that the lessee "shall, prior to the termination of bond liability or at any other time when required and in accordance with all applicable laws and regulations, reclaim all lands the surface of which has been disturbed." Appellants contend that this section makes termination of bond liability contingent on reclamation, in violation of regulatory provisions which state that a lease bond does not cover reclamation obligations. Specifically, they cite 43 CFR 3474.2(a) which provides that a lease bond, which is generally conditioned upon compliance with all lease terms and conditions, "shall not cover reclamation within a permit area."[6] Appellants state that the language in section 10 of the readjusted leases effectively requires double bonding

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[5] On Feb. 5, 1987, appellants withdrew an application to modify coal lease C-07518. *See* Letter to BLM from counsel for appellants, dated Feb. 3, 1987. That application had sought to include additional land in the lease for surface facilities so that underground mining could begin on coal lease C-07518. *See* Letter to BLM from Utah International, dated Sept. 14, 1977.

[6] Appellants also cite 43 CFR 3400.0-5(s) which defines the term "lease bond" to mean the bond given "to assure that all aspects of the mining operation other than reclamation operations under a permit on a lease are conducted in conformity with the approved mining or exploration plan."

for reclamation obligations where reclamation is already subject to a permit and performance bond under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), *as amended,* 30 U.S.C. §§ 1201-1328 (1982). Appellants request that the offending language be deleted.

In its November 1987 decision, BLM stated that a lease bond is "not held as additional security for reclamation of the permit area" (Decision at 3). Thus, BLM declined to delete the language in section 10 of the readjusted leases, concluding that it applies "to all lease areas not included in the mine permit area." *Id.* Accordingly, BLM overruled appellants' objections to the language in section 10 of appellants' readjusted leases governing termination of bond liability.

[2] Land which may be disturbed under a coal lease is not necessarily coextensive with the area either permitted or bonded pursuant to SMCRA. *See* 44 FR 42607 (July 19, 1979) ("The lease bond * * * covers potential damage to surface resources and values on a lease * * * outside a permit area on a lease.") In particular, section 509(a) of SMCRA, 30 U.S.C. §1259(a) (1982), only requires that a performance bond "cover that area of land within the permit area upon which the operator will initiate and conduct surface coal mining and reclamation operations" and upon which succeeding increments of such operations will be initiated and conducted. Thus, it is permissible for BLM to make termination of liability under a lease bond contingent on reclamation of land not subject to a SMCRA permit and performance bond, where such land may have been disturbed by the lessee. This is not precluded by 43 CFR 3474.2(a), which constrains a lease bond from covering only "reclamation *within a permit area.*" (Emphasis added.) However, we also recognize that the language in section 10 of appellants' readjusted leases may be interpreted as being more expansive because it makes termination of bond liability contingent on reclamation of "all lands the surface of which has been disturbed." This could make termination of bond liability in part contingent

on reclamation of leased land which is already subject to a SMCRA permit and performance bond, and arguably might violate 43 CFR 3474.2(a) which precludes a lease bond from covering reclamation within a permit area and which was intended to avoid "dual bonding" (43 FR 41682 (Sept. 18, 1978)). *See Coastal States Energy Co.*, 94 IBLA 352, 357-58 (1986).

However, we find no reason to strike the language in question. BLM has represented that the language applies to those lease areas not included in the mine permit area. We find that that representation is binding on BLM. Moreover, we note that 43 CFR 3474.3(b)(2) and 30 CFR 740.15(a) provide mechanisms for BLM, on its own or at the instigation of a lessee, to correct a situation of double bonding for reclamation obligations, in order to avoid a conflict with 43 CFR 3474.2(a). Departmental regulation 43 CFR 3474.3(b)(2) provides that: "After consultation with the Surface Mining Officer, the authorized officer may release the amount of any outstanding bond which is related to, and is not necessary to secure, the performance of reclamation within a permit area." In promulgating the predecessor of 43 CFR 3474.3(b)(2), which contained virtually identical authority, the Department explained:

> The lease bond will not duplicate the reclamation performance bond; the final rulemaking contains an express provision in §3474.3(b) for adjusting existing lease bonds to assure that the two bonds operate in a wholly complementary manner. In fact, new subsection 3474.3(b) provides that the lease bond amount be reduced by elimination of coverage of reclamation obligations.

44 FR 42607 (July 19, 1979). Also, 30 CFR 740.15(a) provides that:

> (1) Each holder of a Federal coal lease that is covered by a Federal lease bond required under 43 CFR Part

> 3474 may apply to the authorized officer for release of liability for that portion of the Federal lease bond that covers reclamation requirements.
>
> (2) The authorized officer may release the liability for that portion of the Federal lease bond that covers reclamation requirements if:
>
> (i) The lessee has secured a suitable performance bond covering the permit area under this part;
>
> (ii) There are no pending actions or unresolved claims against existing bonds; and
>
> (iii) The authorized officer has received concurrence from OSM and the Bureau of Land Management.

Thus, where, at the time of readjustment, leased land is already subject to a SMCRA permit and performance bond or where, following the time for readjustment, leased land becomes subject to a SMCRA permit and performance bond, the lessee may request a release of or BLM may on its own release the lessee's lease bond liability to the extent it covers compliance with reclamation obligations within a permit area. Such a release will bring the lease bond itself fully into compliance with 43 CFR 3474.2(a). We affirm BLM's November 1987 decision to the extent BLM overruled appellants' objections to section 10 of the readjusted leases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

/s/ Bruce R. Harris

Bruce R. Harris
Administrative Judge

I concur:

/s/ R. W. Mullen

R. W. Mullen
Administrative Judge

APPENDIX G

United States Court of Appeals
FOR THE TENTH CIRCUIT

TRAPPER MINING INC., *Plaintiff-Appellant,* v. MANUEL LUJAN, JR., NEIL MORCK, BRUCE HARRIS, AND R.W. MULLIN, *Defendants-Appellees.*	No. 89-1372
WYODAK RESOURCES DEVELOPMENT CORP., *Plaintiff-Appellee,* v. MANUEL LUJAN, JR., Secretary of the Department of Interior; and WILLIAM H. LEE, Chief, Branch of Mining Law and Solid Minerals, Wyoming State Office Bureau of Land Management, United States Department of the Interior, *Defendants-Appellants.*	No. 90-8025

ORDER

Filed March 20, 1991

Before LOGAN and MOORE, Circuit Judges, and GREENE, District Judge.*

*Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of the joint petition for rehearing filed by the appellant in 89-1372 and the appellee in 90-8025.

Upon consideration whereof, the petition for rehearing is denied.

Entered for the Court

/s/ Robert L. Hoecker

ROBERT L. HOECKER

APPENDIX H

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

FRANKLIN REAL ESTATE CO.

IBLA 85-692 Decided August 29, 1986

Appeal from a decision of the Colorado State Office, Bureau of Land Management, declaring that coal lease C-012894 will be readjusted.

Affirmed.

1. Coal Leases and Permits: Leases — Coal Leases and Permits: Readjustment—Rules of Practice: Appeals: Standing to Appeal

   Where BLM sends a Federal coal lessee a notice of readjustment stating that its lease will, in fact, be readjusted and that the terms and conditions of readjustment will be forwarded within 2 years of receipt of the notice, the lessee may protest that notice and an appeal will lie from a decision denying that protest because the lessee is a party to a case who has been adversely affected by BLM's decision.

2. Coal Leases and Permits: Leases — Coal Leases and Permits: Readjustment

   For purposes of coal lease readjustment periods, any coal lease issued prior to enactment of the Federal Coal Leasing Amendments Act of August 4, 1976, 30 U.S.C. §§ 201, 209 (1982), whose 20-year readjustment period expires after August 4, 1976, is automatically converted at that time to a 10-year readjustment interval. Failure to provide timely notice of readjustment means that the Department waives the right to impose any other

new terms and conditions on the lease until the end of the next 10-year readjustment period.

APPEARANCES: Hugh C. Garner, Esq., Judith S. H. Atherton, Esq., and Willie G. Stehlin, Esq., Salt Lake City, Utah, for appellant; Lowell L. Madsen, Esq., Office of the Regional Solicitor, Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Franklin Real Estate Company (Franklin) appeals from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated May 13, 1985, in which it restated its position that appellant's coal lease C-012894 would be subject to readjustment on December 1, 1986, in accordance with section 3(d) of the lease and 43 CFR 3451.1(a)(1), the Departmental regulation providing for readjustment of lease terms.

Coal lease C-012894 was issued effective December 1, 1956, to Edward Lasnik pursuant to section 7 of the Mineral Leasing Act (MLA) of 1920, 30 U.S.C. § 207 (1952), for an "indeterminate period." The lease contains 634.42 acres in T. 5 N., R. 89 W., sixth principal meridian, Routt County, Colorado. Lasnik assigned the lease to Charles L. and Paul J. Silengo who assigned it to appellant. The assignment to appellant was approved effective June 1, 1975. In 1976, the Federal Coal Leasing Amendments Act (FCLAA), 30 U.S.C. §§ 201-209 (1982), was enacted imposing new or additional requirements on Federal coal leases when issued or readjusted.

By decision of August 2, 1979, BLM notified appellant that lease C-012894 was subject to the readjustment of terms and conditions on December 1, 1976. Appellant objected to the notice, arguing that BLM had no right to readjust the lease 2½ years after its anniversary date. BLM treated the objection as a protest, and in a decision dated December 3, 1981,

dismissed the protest and readjusted the lease. Franklin appealed and the Board in accordance with the judicial mandate of *Rosebud Coal Sales Co. v. Andrus (Rosebud)*, 667 F.2d 949 (10th Cir. 1982), and *California Portland Cement Co. v. Andrus (Portland)*, 667 F.2d 953 (10th Cir. 1982), vacated BLM's decision to readjust lease C-012894 finding BLM's notice of readjustment was untimely. *Franklin Real Estate Co.*, 71 IBLA 13 (1983).

On April 7, 1983, BLM sent a notice to appellant which included the following statement:

> As a result of the above-cited IBLA decision, coal lease C-012894 will continue with the same terms and conditions as issued December 1, 1956, including the royalty provisions of 15 cents on every ton of 2,000 pounds of coal mined. Pursuant to regulation 43 C.F.R. 3451.1(a)(1), this lease is subject to readjustment on December 1, 1986.

Appellant did not respond to this notice. On December 28, 1984, BLM, relying on 30 U.S.C. § 207(a) (1982) and 43 CFR 3451.1(a)(1) (1984), informed appellant by a notice of "Lease Terms and Conditions to be Readjusted," that its lease was subject to readjustment on December 1, 1986 and stated that "the terms and conditions of the lease [C-012894] . . . will be readjusted." BLM further stated in the notice that "[a] notice containing the proposed readjusted terms and conditions will be forwarded to you within two years of your receipt of this notice."

On March 19, 1985, appellant wrote BLM expressing its concern over BLM's notice of intent to readjust the lease terms as of December 1, 1986. Appellant contended that its lease was not due to be readjusted until December 1, 1996, based on its interpretation of 43 CFR 3451.1(a)(1). That regulation, effective July 19, 1979, states that "[a]ll leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the *current* 20-year period and at the end of each

10-year period thereafter." (Emphasis supplied.) Although originally due for readjustment as of December 1976, appellant pointed out that the lease was not readjusted at that time, and, consequently, the lease's second 20-year term began to run as of that date. Appellant contended that the second 20-year term was in effect at the time 43 CFR 3451.1(a)(1), was promulgated, thus making it the "current 20-year period."

Following further exchange of correspondence on this subject, BLM issued its decision of May 13, 1985. Therein, BLM referred to the Board's disposition of the appeal of *Utah International, Inc.*, IBLA 84-807. That appeal, which involved a situation similar to appellant's, was dismissed without prejudice by the Board's order of December 31, 1984. BLM quoted the Board's statement that "appellants cannot at present allege facts showing that they are adversely affected." BLM stated that Franklin "appears to be in a similar position as IBLA considers our notice of intent to readjust a coal lease 'a non-binding expression' of the time at which a readjustment might occur." BLM reiterated its decision that coal lease C-012894 is subject to readjustment on December 1, 1986, and would be readjusted at that time in accordance with section 3(d) of the lease and 43 CFR 3451.1(a)(1).

Franklin has sought review of that May 13, 1985, decision. It contends that BLM's decision that its lease is subject to readjustment as of December 1, 1986, is ripe for appeal under 43 CFR 4.410(a). Regarding the substance of the appeal, appellant asserts that section 207(a) of FCLAA, which creates a 20-year primary term with subsequent 10-year readjustment intervals thereafter for leases issued after its passage, applies only to post-FCLAA leases. As for the regulations issued pursuant to FCLAA, appellant admits that 43 CFR 3451.1(a)(1) does apply to pre-FCLAA leases, but it interprets 43 CFR 3451.1(a)(1) to mean that its lease is subject to readjustment at the end of the *current* 20-year period, which, it argues, would be December 1, 1996. Appellant

explains that its lease was subject to readjustment at the expiration of its first 20-year readjustment interval, December 1, 1976. Since BLM did not readjust at that time, appellant contends that the lease's second 20-year interval began on December 1, 1976. Appellant asserts that this second 20-year period is the *current* 20-year period, as provided by 43 CFR 3451.1(a)(1), and that consequently the lease is not subject to readjustment until December 1, 1996.

Appellant further contends that by selectively imposing new lease term provisions outside of regularly scheduled readjustment periods, BLM has violated express congressional and administrative policy to the contrary. The imposition of a 10-year readjustment period, according to appellant, is a breach of contract because BLM has readjusted section 3(d) of the lease which provides for 20-year readjustment intervals. Appellant explains that BLM waived the right to readjust the lease in 1976, and, therefore, the terms and conditions cannot be changed until the next scheduled readjustment, 1996. Appellant asserts that in readjusting section 3(d) of the lease, by altering 20-year readjustment intervals to 10-year readjustment intervals, BLM has breached its contractual obligation to readjust only at the end of specifically agreed intervals of 20 years.

Appellant contends that BLM's decision to readjust the lease as of December 1, 1986, disregards the court's ruling in *Rosebud, supra*, and *Portland, supra*, and the Board's decision in *Franklin Real Estate Co., supra*, because BLM's imposition of the 10-year interval readjusts section 3(d) of the lease and thereby violates the rulings of the court, as well as the Board.

In its answer, BLM cites court and Board decisions holding that the FCLAA does apply to leases issued prior to the enactment of the law. Responding to appellant's contention that BLM waived its right to readjust the lease in December 1976, BLM states that the law specifically provides that subsequent readjustment periods must be at 10-year intervals

and that the Secretary has no authority to waive or ignore that specific provision.

BLM distinguishes *Rosebud, supra*, and *Portland, supra*, by pointing out that those cases involved leases which became subject to readjustment prior to FCLAA, and, therefore, there was no statute requiring 10-year readjustment periods. BLM states that its decision to readjust the lease is not inconsistent with *Franklin Real Estate Co., supra*, which denied BLM the right to readjust Franklin's lease as of December 1, 1976. BLM explains that a review of that decision reveals that the Board did not consider the impact of section 6 of FCLAA, insofar as the length of subsequent readjustment periods is concerned.

In reply to BLM's answer, appellant refers to BLM's statement that the Secretary must impose the terms of FCLAA to leases readjusted after enactment of FCLAA. Appellant contends that the terms of FCLAA must be imposed only upon timely readjustment.

Subsequently, in an amendment to its statement of reasons, appellant refers to section 3(d) of the lease which provides that the lessor shall have the right to readjust terms and conditions at the end of 20 years from the date of the lease and thereafter at the end of each succeeding 20-year period during the continuance of the lease "*unless otherwise provided by law at the time of the expiration of any such periods.*" (Emphasis added.) Appellant points out that in order to support its decision to readjust the lease in 1986 rather than 1996, BLM is assuming that the "unless otherwise provided by law" language causes all statutes and amendments existing upon the date of lease readjustment to be automatically incorporated into the lease, regardless of whether BLM has actually exercised its option to readjust. Appellant points out that this interpretation of FCLAA was rejected by the United States District Court for the District of Utah in *Coastal States Energy Co. v. Watt*, 629 F. Supp. 9 (1985).

BLM responded by stating that the law in effect at the time of readjustment has not taken the right to readjust away, but has directed the Secretary to readjust at the end of a lease's initial term and impose a mandatory 10-year readjustment period.

[1] At the outset we will discuss BLM's reference to the Board's December 31, 1984, order in *Utah International, Inc.*, IBLA 84-807. BLM noted that in *Utah International* the Board held that the appellants could not allege facts showing that they were adversely affected, as required by 43 CFR 4.410. It stated that Franklin was in a similar position. We find that *Utah International* is distinguishable from the present case.

In *Utah International*, the Board stated:

> Examination of the present facts reveals that BLM's notice of August 3, 1982, did not state that readjustment would occur in 1988 and did not set forth the actual readjusted lease terms. BLM's notice was, at most, a nonbinding expression that 1988 would be the earliest time at which a readjustment *might* occur. [Emphasis added; footnote omitted.]

In that regard the notice to Utah International was similar to that given to Franklin in April 1983. At that time BLM informed Franklin that its lease was "subject to readjustment on December 1, 1986." Franklin did not seek review of that notice and, if it had, the appeal would have been subject to dismissal for the same reasons as set forth in our *Utah International* order.

The December 28, 1984, notice, on the other hand, stated:

> Notice is hereby given that the terms and conditions of the lease *will be* readjusted in accordance with the Mineral Leasing Act, as amended, and the provisions of 43 CFR 3451. *A notice containing the*

> *proposed readjustment terms and conditions will be forwarded to you within two years of your receipt of this notice.* [Emphasis added.]

This notice expressly stated the lease would be readjusted and, in accordance with 43 CFR 3451.1(c)(2), the proposed terms and conditions would be forwarded within 2 years of receipt of the notice. Thus, the December 28, 1984, notice is distinguishable from the April 1983 notice and from the notice in the *Utah International* case, since those notices merely set forth the earliest date at which the leases would be subject to readjustment. The December 28, 1984, notice definitely informed Franklin that its lease would be readjusted effective December 1, 1986. That proposed action was subject to protest by Franklin. *See* 43 CFR 4.450-2. On March 21, 1985, Franklin expressed its objection to the December 1, 1986, readjustment date and on May 13, 1985, BLM essentially dismissed that objection. We find that Franklin is a party to a case who has been adversely affected by BLM's decision within the meaning of 43 CFR 4.410. *Utah International* is not controlling.

The sole substantive issue for consideration is whether Federal coal lease C-012894, which was not readjusted by BLM at the end of its 20-year period, December 1, 1976, is subject to readjustment on December 1, 1986, as claimed by BLM, or on December 1, 1996, as asserted by Franklin.

At the time the lease was issued, section 7 of the Mineral Leasing Act of 1920, 30 U.S.C. §207 (1952), provided:

> Leases shall be for indeterminate periods upon condition * * * that at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods.

Section 3(d) of the lease provides:

> The lessor reserves the following rights:
>
> * * *
>
> (d) *Readjustment of terms.* — The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

In 1976, section 7 of the MLA was amended by section 6 of FCLAA, 30 U.S.C. §207(a) (1982), to read in pertinent part as follows:

> A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. * * * The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

Thus, prior to the enactment of FCLAA, Federal coal leases were issued for an indeterminate duration subject to 20-year readjustment intervals. FCLAA changed that to provide that leases would issue with 20-year primary terms subject to readjustment at the end of that term and at the end of each 10-year period thereafter, as long as the lease was extended. FCLAA itself did not specifically address the status of coal leases issued prior to its enactment. However, in regulations promulgated July 19, 1979, the Department stated that all leases issued prior to August 4, 1976 (pre-FCLAA leases), would be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period

thereafter." 43 CFR 3451.1(a)(1). The same regulation provides that leases issued after August 4, 1976 (post-FCLAA leases), will be subject to readjustment at the end of the first 20-year period and each 10-year period thereafter.

Franklin, therefore, argues that when BLM failed to readjust its lease in 1976, the lease automatically commenced a second 20-year term in accordance with section 3(d) of the lease and that the second 20-year period was the "current" 20-year term at the time the regulations were promulgated. BLM contends, however, that while the Secretary has some discretion in readjusting terms and conditions of a coal lease at the expiration of its 20-year period, that discretion is limited where "the law specifically directs that a term be included." BLM Answer at 6. BLM claims the Secretary has no discretion in imposing the December 1, 1986, readjustment date because "[t]he law specifically provides that subsequent readjustment periods must be at 10-year intervals." BLM Answer at 6. The Secretary cannot ignore or waive that provision, BLM argues. It cites two Board decisions in support of its argument, *Coastal States Energy Co.*, 70 IBLA 386, 391 (1983) and *Lone Star Steel Co.*, 65 IBLA 147, 150 (1982).

Those cases cited by BLM state that BLM is required to impose those terms and conditions required by statute or regulation. Both of those cases, however, involved situations in which BLM had made *timely* readjustments. What the Board's decisions indicated was that arguments concerning terms and conditions required by law must be rejected because the imposition of such terms and conditions is mandatory where BLM has provided timely notice of readjustment. As noted above, BLM's notice of readjustment in 1979 was not timely.

While we find Franklin's arguments regarding the "current 20-year period" to be appealing, they do not withstand close scrutiny. The Board has held that failure to provide notice of readjustment prior to the end of the 20-year lease term constitutes a waiver of the right to readjust. *Franklin*

Real Estate Co., supra; *Kaiser Steel Corp.*, 63 IBLA 363 (1982). We have also stated, however, that waiver of the right to readjust relates only to the readjustment period in question, and the Department may readjust the lease at the "next appropriate period" in accordance with procedural guides then in existence. *Consolidation Coal Co.*, 87 IBLA 296, 303 (1985). We must now determine what that "next appropriate period" is.

[2] In our analysis we look first to the language of FCLAA, but it provides no guidance concerning the readjustment period for pre-FCLAA leases. Next, we turn to the legislative history of that Act. There we find the remarks of Representative Patsy T. Mink, Chairman of the Subcommittee on Mines and Mining of the House Committee on Interior and Insular Affairs, who stated:

> In summary, Mr. Chairman, let me emphasize that the provisions of H.R. 6721 are intended to correct the inadequacies of present law which permit the speculative holding of leases and provide a poor return to the public. *The 533 existing Federal leases would be unaffected by the bill except to the extent its provisions are made applicable upon the periodic ten year readjustment of lease terms*, or upon the inclusion of an existing lease in a logical mining unit. [Emphasis added.]

122 Cong. Rec. 489 (1976). This statement is a clear expression of Congressional intent that pre-FCLAA leases be subjected to the periodic 10-year readjustment of lease terms.

Following enactment of FCLAA, the Department issued proposed rulemaking on October 15, 1976, 41 FR 45573, addressing the readjustment period for coal leases as follows:

> (6) 43 CFR 3522.2-1 is amended to read as follows:
>
> §3522.2-1 Terms and conditions.
>
> * * *
>
> (b) *Coal.* All coal leases will be subject to readjustment at the end of the first 20-year period following the issuance of the lease and at the end of each ten-year period thereafter.

This regulation did not distinguish between pre-FCLAA and post-FCLAA leases. Also it failed to recognize that at the time of its issuance some coal leases were in 20-year periods beyond their first. However, the regulation was adopted without change or comment in final rulemaking published December 29, 1976. 41 FR 56646.

Subsequently, the Department proposed more comprehensive rules to govern coal lease readjustments. 44 FR 16800 (March 19, 1979). The proposed rulemaking included the language of 43 CFR 3451.1(a):

> All leases issued prior to August 4, 1976, shall be subject to readjustment at the end of the current 20-year period and at the end of each 10-year period thereafter. All leases issued after August 4, 1976, shall be subject to readjustment at the end of the first 20-year period and each 10-year period thereafter, if the lease is extended.

44 FR 16832 (March 19, 1979). The preamble contained no explanation of this language and no explanation was included in the final rulemaking which contained the same language at 43 CFR 3451.1(a)(1). 44 FR 42635 (July 19, 1979).

Franklin argues that in July 1979 it was in its second 20-year period, and, thus, its "current" 20-year period does not expire until December 1, 1996. However, we construe the Department's regulations to be consistent with the express Congressional intent that pre-FCLAA leases be converted to 10-year readjustment periods. When the Department published the regulations in 1979, it assumed that all pre-FCLAA leases whose 20-year terms had expired after August 4, 1976, would be subject to readjustment.[1] Thus, the reference to "current 20-year period" evidenced an intent to include therein only the 20-year lease periods in effect at the time FCLAA was enacted. Any pre-FCLAA lease whose 20-year period expired after August 4, 1976, would be subject to readjustment on that date *and* at the end of each 10-year period thereafter. The fact that this Board held in 1983 that BLM waived its right to readjust C-012894, when it failed to give timely notice of readjustment in 1976, does not mean that C-012894 may escape readjustment for another 20 years.

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[1] Those regulations, published on July 19, 1979, 44 FR 42635, contained the following provision:

> "The authorized officer shall notify the lessee whether or not any readjustment of terms and conditions is to be made. If feasible, the authorized officer shall so notify the lessee of any lease which becomes subject to readjustment prior to June 1, 1980, before the expiration of the current 20-year period."

43 CFR 3451.1(b) (1979).

At the time, the Departmental policy concerning readjustment was set forth in the preamble to the rulemaking, wherein the Department stated:

> "Comments received from industry objected to the Department of the Interior's assertion of the authority to readjust when the lessee was not so notified at the 20-year anniversary date * * *. The Secretary of the Interior, acting through the Board of Land Appeals, has reaffirmed the Bureau of Land Management's authority to make such readjustments, *California Portland Cement Co.*, 40 IBLA 339 (May 10, 1979), [*reversed, Portland, supra*] and it is the Department's policy to proceed with these readjustments.

(footnote continues)

We find that it was the intent of Congress that pre-FCLAA leases be converted to 10-year readjustment periods at the time of the expiration of the lease period in effect on August 4, 1976. At the time of passage of FCLAA, C-012894 was in its first 20-year period. When that period expired December 1, 1976, C-012894 automatically converted to a 10-year readjustment schedule. Although the readjustment of all other terms and conditions was waived, BLM was entitled to readjust C-012894 at the expiration of the 10-year readjustment period upon timely notice.

(footnote continued)

> "Several industry comments also objected to section 3451.1(b), which is consistent with the readjustment policy discussed above, and applies to leases with anniversary dates between August 4, 1976, and June 1, 1980. As evidenced by section 3451.1(d), the Department of the Interior is meeting the concern behind the industry objections by providing that beginning with June 1, 1980, failure to notify the lessee of readjustment prior to the readjustment anniversary date will constitute a waiver of the right to readjust. In turn, this provision was roundly criticized by public interest groups in their comments because they regarded it as an abrogation of authority. The Department's position is that while it is wholly lawful to readjust existing leases that were not readjusted on, or where notification of readjustment did not occur before, their anniversary dates, the Department will, beginning with June 1, 1980, assure timely and competent administration of leases by self-imposition of the sanction of waiver. This will guarantee accountability, and will prevent any future situation like that which prevailed with respect to lease readjustments during the early 1970's. On such leases, the notice whether the lease will be readjusted or not will be sent prior to the readjustment anniversary date, or the opportunity to readjust will be lost."

44 FR 42601-02 (July 19, 1979). Thus, the Department asserted it had authority to readjust leases even when the lessees were not notified at the 20-year anniversary date, and that such a policy would be applied to leases with anniversary dates between August 4, 1976, and June 1, 1980. Following the issuance of the *Rosebud* and *Portland* decisions, *supra*, the Department issued final rulemaking deleting 43 CFR 3451.1(b). 47 FR 33146 (July 30, 1982). That rulemaking did not, however, change the "current 20-year period" phrase in 43 CFR 3451.1(a)(1).

Franklin also directs our attention to *Coastal States Energy Co. v. Watt*, 629 F. Supp. 9 (D. Utah 1985), stating that therein the court specifically rejected BLM's contention that the language "unless otherwise provided by law at the time of expiration of any such period," included in the leases in that case (and also in the lease herein), automatically incorporates existing statutes into leases subject to readjustment.

The court stated at 20:

> The Secretary argues that the lease provision, "unless otherwise provided by law at the expiration of any such period," allows the BLM to include the royalty provisions of the FCLAA in a lease at the time of readjustment. The court disagrees. The "unless otherwise provided by law" language modifies the right to readjust. In other words, the Secretary has the right to readjust unless the law in effect at the time of readjustment has taken that right away. The "unless otherwise provided by law" language does not incorporate statutes in effect at the time of readjustment.

That language does not strengthen Franklin's position regarding the period of readjustment. What the court concluded was that the "unless otherwise provided" provision relates only to the Secretary's right to readjust. Here, the right to readjust has not been taken away. FCLAA sets forth new terms and conditions to be added to leases at the time of readjustment. In addition, at issue in that case were the royalty provisions. The court was not addressing the period of readjustment.

We conclude that the 10-year period of readjustment applies to a pre-FCLAA lease upon the expiration of its 20-year period following August 4, 1976, whether or not BLM has provided the lessee with timely notice of readjustment. This is consistent with the intent of Congress that pre-FCLAA leases be converted to 10-year readjustment periods.

Because BLM failed to provide timely notice of readjustment in 1976, Franklin has escaped the imposition of new terms and conditions for a period of 10 years. BLM properly informed Franklin that its lease would be subject to readjustment in 1986.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

/s/ Bruce R. Harris

Bruce R. Harris
Administrative Judge

We concur:

/s/ Anita Vogt

Anita Vogt
Administrative Judge
Alternate Member

/s/ John H. Kelly

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Respectfully submitted,

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Supreme Court, U.S.
FILED
AUG 15 1991
OFFICE OF THE CLERK

(3)

No. 90-1940

In the Supreme Court of the United States

OCTOBER TERM, 1991

TRAPPER MINING, INC., ET AL., PETITIONERS

v.

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners entered into leases to mine coal on federal land pursuant to a statute that provided for readjustment of the terms of such leases at 20-year intervals "unless otherwise provided by law at the time of the expiration of such periods," 30 U.S.C. 207 (1970). The questions presented are:

1. Whether petitioners' coal leases, which incorporate the statutory provision, permitted Congress to reduce the readjustment interval from 20 years to 10 years effective at the expiration of the 20-year readjustment period.

2. Whether the 1976 amendments to the statute, 30 U.S.C. 207(a), reduced the readjustment interval of petitioners' coal leases from 20 years to 10 years at the expiration of the 20-year readjustment period.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. A1-A14, is reported at 923 F.2d 774. The bench ruling and orders of the district courts, Pet. App. A15-A32, A35-A40, are unreported. The decisions of the Interior Board of Land Appeals (IBLA), Pet. App. A41-A51, A52-A65, are reported at 106 I.B.L.A. 339 and 103 I.B.L.A. 366.

JURISDICTION

The judgment of the court of appeals was entered on January 15, 1991. A joint petition for rehearing was denied on March 20, 1991. Pet. App. A66-A67. The petition for a writ of certiorari was filed on June 18, 1991. The ju-

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Trapper Mining Inc. (Trapper) and Wyodak Resources Development Corp. (Wyodak) obtained leases to mine coal on federally-owned lands in Colorado and Wyoming from the Department of the Interior under Section 7 of the Mineral Leasing Act (MLA), 30 U.S.C. 207 (1970). Section 7 required that leases be granted "for indeterminate periods upon condition of diligent development and continued operation of the mine or mines"; that the Secretary condition leases upon payment of a minimum production royalty of five cents per ton; and that "at the end of each twenty-year period succeeding the date of the lease such readjustment of terms and conditions may be made as the Secretary of the Interior may determine, unless otherwise provided by law at the time of the expiration of such periods." *Ibid.*

Each of petitioners' leases provides for readjustment in terms and at intervals consistent with Section 7. Section 3(d) reserves to the government:

> The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease unless otherwise provided by law at the time of the expiration of any such period.

Pet. App. A3, A76.

2. In 1976, Congress revised the coal leasing provisions of the MLA in the Federal Coal Leasing Amendments Act (FCLAA), Pub. L. No. 94-377, 90 Stat. 1083. Section 6 of the FCLAA, 90 Stat. 1087 (codified at 30 U.S.C. 207), amended Section 7 of the MLA, 30 U.S.C.

207 (1970). Among other changes, Section 6 requires the payment of royalties, "in such amount as the Secretary shall determine," of not less than 12.5 percent of the value of coal mined. 30 U.S.C. 207(a). Section 6 also requires readjustment of leases at the end of the "primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended." *Ibid.*[1] Consistent with Section 6, the Secretary promulgated regulations in 1976 providing that "[a]ll coal leases will be subject to readjustment at the end of the first 20-year period following issuances of the lease and at each ten-year period thereafter." 41 Fed. Reg. 56,646 (formerly codified at 43 C.F.R. 3522.2-1(b)(1977)). The current regulations, issued in 1979, likewise provide that all pre-FCLAA leases (*i.e.*, those issued prior to August 4, 1976) "shall be subject to readjustment at the end of their current 20-year period and at the end of each 10-year period thereafter." 43 C.F.R. 3451.1(a)(1).

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[1] The amendment provides in relevant part:

> (a) A coal lease shall be for a term of twenty years and for so long thereafter as coal is produced annually in commercial quantities from that lease. Any lease which is not producing in commercial quantities at the end of ten years shall be terminated. The Secretary shall by regulation prescribe annual rentals on leases. A lease shall require payment of a royalty in such amount as the Secretary shall determine of not less than 12 1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations. The lease shall include such other terms and conditions as the Secretary shall determine. Such rentals and royalties and other terms and conditions of the lease will be subject to readjustment at the end of its primary term of twenty years and at the end of each ten-year period thereafter if the lease is extended.

30 U.S.C. 207.

3. Since Trapper's predecessor in interest obtained its two leases in 1958, and Wyodak obtained its lease in 1959, the leases at issue in this case first became subject to readjustment in 1978 and 1979. The Interior Department's Bureau of Land Management (BLM) forfeited the government's right to readjust the terms of the leases at that time, however, by sending an untimely notice of readjustment to Trapper and by failing to send actual changes in terms and conditions to Wyodak despite a timely notice. Pet. App. A4, A25, A54; see *Rosebud Coal Sales Co.* v. *Andrus*, 667 F.2d 949, 952-953 (10th Cir. 1982); *Kaiser Steel Corp.*, 63 I.B.L.A. 363 (1982). The BLM subsequently notified petitioners that their leases would be readjusted 10 years after the twentieth anniversaries of the leases in accordance with Section 6 of the FCLAA.[2] Pet. App. A4.

Both petitioners told the BLM that they objected to the 1988 and 1989 readjustment of their coal leases. They argued that the readjustment interval could be modified only through a valid readjustment by the Secretary, which could not occur until the expiration of another 20-year period. The BLM overruled that objection. Pet. App. A44, A56. On appeal, the IBLA affirmed the BLM's decisions in relevant part. Pet. App. A41-A51, A52-A65.

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[2] The Wyoming State Office of the BLM had previously sent Wyodak a letter erroneously stating that its lease would be subject to readjustment again in 1999. Wyodak argued before the lower courts that the Secretary was estopped from readjusting its lease in 1989, an argument that the court of appeals rejected. Pet. App. A12-A13. See *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917) ("the United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit").

4. Trapper and Wyodak filed petitions for review in the United States District Courts for the Districts of Colorado and Wyoming. Pet. App. A4.

The Colorado district court affirmed the readjustment of Trapper's leases. Pet. App. A35-A39. It noted that the government may modify contracts by subsequent legislation and held that the "clear language" of the statute and relevant case law indicate that Congress intended the ten-year period mandated by the FCLAA to apply automatically to Trapper's leases on their twentieth anniversaries. *Ibid.*

The Wyoming district court reversed the readjustment of Wyodak's lease. Pet. App. A23-A32. It held that the 20-year readjustment period is simply a "term" of the lease, and, like other terms and conditions of Wyodak's lease, could not be changed absent a valid readjustment by the Secretary. *Ibid.*

5. The court of appeals consolidated the two cases and upheld the readjustment of petitioners' leases. Pet. App. A1-A22. First, the court stated that Congress has the authority to modify contracts through subsequent legislation unless such authority is "surrendered in unmistakable terms." Pet. App. A7. Petitioners' leases did not surrender the power to modify the readjustment interval by statute; to the contrary, they expressly provided for readjustment by the Secretary every 20 years "unless otherwise provided by law" at the end of such a period. *Ibid.* The court rejected petitioners' argument that this "exception" only reserved to Congress the power to control the *Secretary's* authority to readjust the coal leases. It held that Congress instead reserved the power to establish by statute a new readjustment interval for federal coal leases to apply at the expiration of a 20-year period. Pet. App. A7-A9.

Second, the court of appeals concluded that Congress exercised its authority in Section 6 of the FCLAA. The

plain language of the statute states that leases "will be" subject to readjustment every ten years after the first 20-year period ends. Pet. App. A10. The court concluded that the mandatory language is "self-executing" and "directly imposes the new interval rather than just modifying the Secretary's authority over the term." *Ibid.* The court distinguished other provisions in Section 6, such as the one requiring a minimum royalty rate, because they are "couched as a restriction on the Secretary's power" to readjust, "not as a direct imposition of the new rate." Pet. App. A10, A12.

ARGUMENT

1. The first question presented is of limited and diminishing significance. It concerns the readjustment interval in federal coal leases entered into before passage of the FCLAA in 1976. It arises only in leases that the Secretary mistakenly fails to adjust. And it has been decided only by the court of appeals in this case. Since the lower court's decision is correct and does not conflict with any decision of this Court or of any other court of appeals, further review is not warranted.

a. Petitioners read their coal leases to say that "Congress did not reserve the power to directly modify the twenty-year interval or any other terms in the petitioners' lease agreements by legislation." Pet. 14. Petitioners rely on Section 3(d) of their leases, which reserves to the government:

> The right reasonably to readjust and fix royalties payable hereunder and other terms and conditions at the end of 20 years from the date hereof and thereafter at the end of each succeeding 20-year period during the continuance of this lease *unless otherwise provided by law at the time of the expiration of any such period.*

Pet. App. A3, A76 (emphasis added).

Contrary to petitioners' interpretation, the "unless otherwise provided by law" clause reserves to the government the authority to change—"by law"—the readjustment interval (and any "other terms and conditions" of the lease) "at the time of the expiration of any such [20-year readjustment] period." Although petitioners suggest that the scope of the clause is ambiguous, Pet. 13-14, that ambiguity does not affect the proper disposition of this case. Whether the clause modifies all the "terms and conditions" of the lease or just the readjustment interval, it plainly reserves Congress's statutory authority to reduce from 20 years to 10 years the period during which the Secretary may not readjust the lease.

The "unless otherwise provided by law" clause cannot plausibly be read to modify the Secretary's "right" to readjust. Congress has the right to limit the Secretary's authority, regardless of the lease provision, and may exercise that right at times other than "at the time of the expiration of any such [20-year readjustment] period." Pet. App. A3. It is likewise implausible to read the clause to modify the word "reasonable," for on that view, Congress would have reserved to itself the power to impose "unreasonable" terms on lessees. See Pet. App. A8.[3]

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[3] The court of appeals' interpretation of the "unless otherwise provided by law" clause is consistent with its construction of the clause in two prior decisions. See *FMC Wyoming Corp.* v. *Hodel*, 816 F.2d 496, 501 n.9 (10th Cir. 1987), cert. denied, 484 U.S. 1041 (1988); *Coastal States Energy Co.* v. *Hodel*, 816 F.2d 502, 505-506 n.6 (10th Cir. 1987). There is even less reason for review by this Court now than there was when certiorari was denied in *FMC Wyoming Corp.* Moreover, as the court of appeals correctly recognized, Pet. App. A8—contrary to petitioners' contention, Pet. 13 n.5—its earlier decisions did not read the clause to preserve only Congress's right to circumscribe the Secretary's readjustment authority. In any event, any allegation of an intra-circuit

Although Section 3(d) goes on to provide petitioners with notice and an opportunity to object to proposed readjusted terms, Pet. 5, the notice and comment provision does not (contrary to petitioners' contention, Pet. 12 & n.3) surrender the government's authority to impose a new readjustment interval by law. The Secretary's "right reasonably to readjust" the lease terms—and the notice and comment procedure that accompanies it—is expressly superseded if "otherwise provided by law at the time of the expiration of any such" readjustment interval.

Petitioners also cite the introductory paragraph of their leases, which incorporates the law in effect at that time, as evidence that the lease agreements are immune from subsequent legislation. Pet. 12. The affirmative incorporation of existing law, however, does not impliedly exclude the applicability of subsequent legislation. Instead, the reservation of authority to readjust the lease and to impose other changes "provided by law" makes clear that the parties to the lease anticipated the need to comply with subsequent legislation.

b. Even if the leases did not expressly "*reserve*" Congress's authority to modify the readjustment interval by law, Pet. 14 (emphasis added), Congress would nevertheless retain that authority because it did not "*surrender[]*" it "in unmistakable terms," *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) (quoting *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982) (emphasis added)). In *Public Agencies*, this Court reiterated the principles governing contractual relationships between the United States and private parties. It emphasized "this Court's often-repeated admonitions that contracts should be

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conflict is for the court of appeals, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957).

construed, if possible, to avoid foreclosing exercise of sovereign authority." 477 U.S. at 52-53. Accordingly, contracts—including those to which the government is a party—remain "'subject to subsequent legislation' by the sovereign" unless its authority to exercise such right is "surrendered in unmistakable terms." *Id.* at 52 (quoting *Merrion*, 455 U.S. at 148).

The coal leases in this case did not surrender Congress's power to enact subsequent legislation affecting the government's contracts under the MLA. As the court of appeals pointed out, the statutory phrase, "unless otherwise provided by law at the time of the expiration of such [readjustment] periods," 30 U.S.C. 207 (1970), is echoed in petitioners' original pre-FCLAA leases. Pet. App. A7. Reasoning that interpretations of contracts "which would immunize them from the sovereign power of the United States to change its laws should be avoided," *ibid.* (citing *Public Agencies*), the court of appeals correctly concluded that Congress did not surrender its power to change the readjustment interval by statute, *ibid.*

Petitioners assert that since the government drafted the coal leases (in language tracking Section 7 of the MLA), any ambiguity should be construed against the United States, as it might be construed against a private party. Pet. 14. But the government is not a private party, and—as this Court has repeatedly held—any surrender of governmental regulatory authority through contract must be expressed in "clear and unmistakable" terms. *Merrion*, 455 U.S. at 148; accord *Public Agencies*, 477 U.S. at 52. Although petitioners assert that the rules applicable to private parties apply to the government when it enters into a commercial contract, the Court rejected precisely that argument in *Public Agencies*:

> *While* the Federal Government, as sovereign, has the power to enter contracts that confer vested

> rights, and the concomitant duty to honor those rights, see *Perry* v. *United States*, 294 U.S. 330, 350-354 (1935); *Lynch* v. *United States*, 292 U.S. 571 (1934), *we have declined in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract.*

477 U.S. at 52 (quoting *Merrion*, 455 U.S. at 148) (emphasis added). Compare Pet. 16 (omitting italicized words).[4]

2. The second question presented is whether Congress exercised its authority to change the readjustment interval in petitioners' coal leases by Section 6 of the FCLAA. Petitioners concede (Pet. 17) that this question does not independently merit this Court's review. It presents a narrow question of statutory construction which the court of appeals correctly decided.

Section 6 of the FCLAA expressly states that "rentals and royalties and other terms and conditions of the lease *will be* subject to readjustment" every 10 years after the first 20-year period ends. 30 U.S.C. 207(a) (emphasis added). The court correctly characterized that change as "mandatory" and "self-executing." Pet. App. A10. Petitioners argue that the lease conditions subject

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[4] For the same reasons, petitioners' contention (Pet. 14-15) that the court erred in construing the statutory phrase to be "synonymous" with language reserving Congress's right to "repeal, alter, or amend" the statute is without merit. This Court has recently denied certiorari in a case raising a similar issue. *Peterson* v. *Department of the Interior*, 111 S. Ct. 567 (1990). The court of appeals in that case, faced with a statute containing no express reservation, had rejected the claim that Congress must expressly reserve its right to "repeal, amend or alter" legislation to retain that authority. See *Peterson* v. *United States Dep't of the Interior*, 899 F.2d 799, 807-808 (9th Cir. 1990).

to readjustment are limited to those specified in the preceding sentences of Section 6. Pet. 18. But the quoted language does not state that "the preceding conditions will be subject to readjustment every ten years"; it states that "rentals and royalties *and other terms and conditions*" will be. 30 U.S.C. 207(a) (emphasis added).

Petitioners also contend that the "design" and legislative history of the statute fail to support the court of appeals' interpretation. Pet. 18. As the court of appeals correctly recognized, however, the statutory provisions petitioners cite do not deprive Congress of the authority to modify the readjustment interval by law. Pet. App. A12. And although the court rested its holding on the plain language of Section 6, "without reference to the legislative history," it noted that the House debate "supports our conclusion that Congress intended to change the readjustment interval by statute," rather than through the readjustment process. Pet. App. A13. Compare H.R. Rep. No. 681, 94th Cong., 2d Sess. 24 (1975) ("H.R. 6721 provides for a readjustment in the terms of the lease at the end of the 20th year and every ten years thereafter instead of a readjustment every 20 years as *provided in the present law*" (emphasis added)), with *ibid.* ("H.R. 6721 *permits the Secretary* to waive the requirement for continued operation" (emphasis added)).

Petitioners assert that the court of appeals' interpretation makes an "irrational distinction" between the ten-year interval and "other terms and conditions" of the leases. Pet. 18, 19. Contrary to petitioners' contention, treating the readjustment interval differently from other provisions of Section 6 (such as the one governing the Secretary's determination of royalty rates), is entirely consistent with Section 6. As the court of appeals explained:

> [T]he language in [Section] 6 mandating the royalty rate only affects the Secretary's control over the term. It states that "[a] lease shall require payment of a royalty in such amount *as the Secretary shall determine* of not less that 12 1/2 per centum." (Emphasis added.) This requirement is couched as a restriction on the Secretary's power, not as a direct imposition of the new rate.

Pet. App. A10. By contrast, there is no express provision subjecting the length of the readjustment period to readjustment. That reflects the fact that the Secretary has never had the authority to dictate the readjustment interval of coal leases, and therefore "cannot thwart the intent of Congress by simply not undertaking a readjustment"—leaving the leases with their original twenty-year readjustment intervals in force despite the terms of the FCLAA. Pet. App. A11.

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Although petitioners appeal to the sanctity of contracts and "basic fairness," Pet. 16, they have no contractual right to oppose a ten-year readjustment interval. If the Secretary had proposed that change in 1988 and 1989, petitioners would have no legal ground for avoiding it. The Secretary's procedural misstep allowed petitioners to operate ten more years under the terms of their original leases. They are not entitled to 20 years.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/45025